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UNITED STATES

SUPREME COURT REPORTS.

Vols. 90, 91, 92, 93.

EMBRACING ALL OPINIONS IN 23 WALLACE, AND 1, 2 AND 3 OTTO, WITH OTHERS.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

THE UNITED STATES,

IN THE

OCTOBER TERMS, 1874, 1875, 1876.

COMPLETE EDITION,

WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES,
POINTS AND AUTHORITIES OF COUNSEL, FOOT
NOTES AND PARALLEL REFERENCES,

BY

STEPHEN K. WILLIAMS,
Counselor at Law.

BOOK XXIII.

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JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,
HON. MORRISON R. WAITE.

ASSOCIATE JUSTICES,

HON. NATHAN CLIFFORD,	HON. STEPHEN J. FIELD,
HON. NOAH H. SWAYNE,	HON. WILLIAM STRONG,
HON. SAMUEL F. MILLER,	HON. JOSEPH P. BRADLEY.
HON. DAVID DAVIS,	HON. WARD HUNT

ATTORNEYS-GENERAL,
HON. GEORGE H. WILLIAMS,
to Apr. 26, 1875 ; after that
HON. EDWARDS PIERREPONT,
to May 22, 1876 ; after that
HON. ALPHONSO TAFT.

SOLICITOR-GENERAL.
HON. SAMUEL F. PHILLIPS.

CLERK,
DANIEL WESLEY MIDDLETON, Esq.

REPORTERS,
JOHN WILLIAM WALLACE, Esq.
to Oct. Term, 1875 ; after that
WILLIAM T. OTTO, Esq.

MARSHAL,
JOHN G. NICOLAY, Esq.

ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERMS OF 1874-5-6, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM AP- POINTED.	CIRCUITS, 1868-1870.	COMMIS- SIONED.	SWORN IN.	TERMINA- TION.
ASSOCIATE JJ. NATHAN CLIFFORD, Maine.	President BUCHANAN.	FIRST. ME., N. H., MASS., RHODE ISLAND.	1858. (Jan. 12.)	1858. (Jan. 21.)	Died. 1881. (July 25.)
WARD HUNT, New York.	President GRANT.	SECOND. VERMONT, CONN., NEW YORK.	1872. (Dec. 11.)	1873. (Jan. 9.)	Resigned. 1882. (Feb. 1.)
WILLIAM STRONG, Pennsylvania.	President GRANT.	THIRD. NEW JERSEY, PENN., DEL.	1870. (Feb. 18.)	1870. (Mar. 14.)	Resigned. 1880. (Dec. 14.)
CHIEF JUSTICE. MORRISON R. WAITE, Ohio.	President GRANT.	FOURTH. MD., VA., N. C., W. VA., S. C.	1874. (Jan. 21.)	1874. (Mar. 4.)	
ASSOCIATE JJ. JOSEPH P. BRADLEY, New Jersey.	President GRANT.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1870. (Mar. 21.)	1870. (Mar. 23.)	
NOAH H. SWAYNE, Ohio.	President LINCOLN.	SIXTH. KY., TENN., OHIO, MICH.	1862. (Jan. 24.)	1862. (Jan. 27.)	Resigned. 1881. (Jan. 24.)
DAVID DAVIS, Illinois.	President LINCOLN.	SEVENTH. IND., ILL., WIS.	1862. (Dec. 8.)	1862. (Dec. 10.)	Resigned. 1877. (Mar. 4.)
SAMUEL F. MILLER, Iowa.	President LINCOLN.	EIGHTH. MINN., IOWA, MO., KAN., ARK, NEB.	1862. (July 16.)	1862. (Dec. 1.)	
STEPHEN J. FIELD. California.	President LINCOLN.	NINTH. CALIFORNIA, ORE- GON, NEVADA.	1863. (Mar. 10.)	1863. (Dec. 7.)	

P R O C E E D I N G S
OF THE BAR OF THE
SUPREME COURT OF THE UNITED STATES,
ON THE DEATH OF THE LATE
Hon. REVERDY JOHNSON.

The Attorney-General said:

MAY IT PLEASE YOUR HONORS, When an eminent citizen of the Republic, whose eminence has been achieved by an honorable career in the public service, in professional life or in the less conspicuous but not less useful walks of private benevolence, dies—it is fit that some public notice be taken of the event, and that permanent record be made to encourage and inspire those who come after us.

Reverdy Johnson, who recently departed, full of years and of honors, was, during a long period, one of the most eminent lawyers of this country and one of the very foremost counselors of this high court. He held, with distinguished ability and honor, respectively, the great offices of Minister to England, Senator, and Attorney-General of the United States. He has left a fame and an honored memory of which his descendants and his country may be justly proud.

The Bar of the Supreme Court met to do honor to his name, and passed the resolutions which I now have the honor to read:

“ Resolutions.

Resolved, That the Bar of the Supreme Court of the United States has received with deep sorrow the intelligence of the death of Reverdy Johnson, for more than half a century an eminent and honored practitioner in this court.

Resolved, That the memory of Mr. Johnson deserves to be cherished by the Bar, as most honorable to the profession, of which he was a distinguished member, as dear to the court that has benefited by his great contributions to the science of jurisprudence, and as valuable to the Republic, in whose service, as a citizen, Attorney-General and diplomatist, he was wise and faithful.

Resolved, That the Attorney-General be re-

quested to communicate these resolutions to the court, and to move that they be entered of record; and,

Resolved, That they be communicated to the family of Mr. Johnson, with the expression of the earnest condolence of the Bar.”

I ask Your Honors to receive this tribute to the memory of a great lawyer and an eminent public man, and to order these resolutions to be entered in the permanent records of this court.

The *Chief Justice* replied as follows:

The court gives its ready assent to the sentiments so well expressed in the resolutions of the Bar. Mr. Johnson was admitted to practice here on the first day of March, 1824. The first case in which he appeared as counsel was that of *Brown v. The State of Maryland*, argued and decided at the January Term, 1827. Associated with him was the late *Chief Justice* Taney, and opposed, were Mr. Wirt, then the Attorney-General, and Mr. Meredith—all names familiar in history. The opinion was delivered by *Chief Justice* Marshall, and it stands to-day as a monument marking the boundary line between the powers of the United States under the Constitution, on the one hand, and those of the States on the other.

From the commencement of his practice here until his death, Mr. Johnson was extensively employed, with scarcely an intermission, in the most important causes. He was always welcome as an advocate, for he was always instructive. His friendship for the court was open, cordial, sincere. We mourn his loss both as counselor and friend.

The request of the Bar is cheerfully acceded to. The resolutions are received in the same spirit they have been presented, and the clerk will cause them to be entered upon the records of the court.

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CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

OCTOBER TERM, 1874.

Vol. 90.

DISIONS

THE

the United States,

TERM, 1874.

(B) The "internal pressure," as described in the specification, is to be ascertained by deducting from the pressure marked by the steam gauge, the weight of one atmosphere.

[Nos. 58, 151.]

Argued Oct. 30, 31, 1873. Decided Jan. 26, 1874.

A PPEALS from the Circuit Court of the United States for the Eastern District of New York.

The American Wood Paper Company of Rhode Island is the owner of patented inventions for the manufacture of paper pulp and paper from wood, straw and other vegetable substances. These patents are alleged to have been infringed by the Fiber Disintegrating Company, a New York Corporation, having a factory at South Brooklyn, in the Eastern District of New York. This suit in equity was brought in the court below, by the first named Company, to restrain these alleged infringements on the part of the second named Company, and for damages. The bill set forth the title of the complainant to five several letters patent and averred that the inventions therein described are capable of being used conjointly in the production of paper pulp, and that they had been so used by the defendant. These five patents are known as the Watt & Burgess re-issued patents (two), the Keene Boiler patents (two), and the Mellier patent.

The original of the first two patents was granted to Watt & Burgess, July 18, 1854, and antedated Aug. 19, 1853, the date of an English patent. The claim of this patent was "For the pulping and disintegrating of shavings of wood and other similar vegetable matter, for making paper by treating them with caustic alkali, chlorine simple, or its compounds with oxygen and alkali, in the order substantially as described." This patent was subsequently surrendered by William F. Ladd and Morris L. Keene, being the owners of the same, and re-issued to them Oct. 5, 1868. It was again surrendered by Ladd and Keene, and two patents issued to them in lieu thereof, Apr. 7, 1868. One of these patents was for a process, the other for a product. The complainants are the assignees of these patents.

The Keene boiler patents were granted to Morris L. Keene for improvements in boilers for making paper pulp. One of these patents was granted Sep. 14, 1859, and the other June 16, 1868. The complainants are the assignees of these patents.

The Mellier patent was granted May 26, 1857, and antedated Aug. 7, 1854, the date of the first patent for the same invention. The patent is for an improvement in the manufacture of paper pulp. The complainants are also the assignees of this patent.

A further description of each of the patents involved in this case may be found in the opinion.

The decree of the court below declared the Watt & Burgess patents void for want of novelty. The Mellier patent was found to be a good and valid patent, and the defendants were found to be infringers of it. The decree further declared that the defendants were not infringers of the Keene patent. See 6 Blatchf., 27.

The complainants appealed from so much of the decree as relates to the Watt & Burgess and Keene patents, and the defendants appealed from that part of the decree which sustained the complainants' bill as to the Mellier patent.

Mr. T. A. Jenckes, for the American Wood Paper Company:

The Watt & Burgess Patents.

The court below erred in its findings of the law and the facts upon which its decision is based as to the validity of these patents, on the ground of want of novelty in the invention.

The specifications of the two re-issued Watt & Burgess patents described processes for obtaining from wood or other vegetable substances a fiber suitable for the manufacture of paper. The claim of one patent (1448) is for the fiber thus obtained as a new manufacture; the claim of the other (1449) for the processes by which the fiber is eliminated from the wood. These processes as described are two, one applicable to resinous woods, and one to non-resinous woods. The agencies by which this fiber is eliminated are purely chemical. They effect the entire removal of all the constituent elements of the wood except the fiber which is suitable for paper making; that is, the result or product is paper pulp, fit to be wrought at once into brown paper and, when bleached by old and well known processes, into white paper.

The fiber which is to be obtained from the wood is composed of what is termed in chemistry "cellulose." This and the other component parts of the structure of plants are well described in Regnault's Chemistry (secs. 1274 and 1275), which also contains the following definition of the term: "Chemists have given the name of cellulose to that constant substance which they regard as forming the cellular tissue of all plants." The agents by which all the other component parts of the plant are to be removed are heat and "caustic alkali."

By a solution of caustic alkali is meant a solution of the soda-ash of commerce, by the removal of the carbonic acid through the action of quicklime. The soda-ash is an impure carbonate of soda, and its carbonic acid unites with the lime and leaves the alkali in its caustic condition. The usual proportion in the solution is about a pound and a quarter of soda-ash to a gallon of water.

There are other re-agents used in the cleaning and bleaching of the cellulose, after it has been delivered from the boiler or vessel in which it has been cooked, such as hydrochloric acid, which is a compound of hydrogen

and chlorine and the chlorous or hypo-chlorous acid which is a compound of chlorine and oxygen. The true agent in these portions of the processes is the chlorine, which is easily liberated from the substances with which it is combined when sold as an article of commerce.

The substances which are to be removed from the wood are called, as a whole, the intercellular matter.

The action of the caustic alkali, intensified by heat, is generally sufficient to destroy this intercellular matter, although sometimes the further action of chlorine is preferable, as described in the specifications.

The cellulose thus obtained from the wood is perfectly pure and, what is most remarkable and in which the novelty of the invention consists, this substance is of the exact consistency, length and other dimensions required in the fiber for paper making. Watt & Burgess were the first discoverers of this fact, and were the inventors of means to utilize this discovery and to produce by chemical agencies a fiber which could be wrought at once into paper, a better and cheaper article for the purpose than had before been produced by mechanical agencies.

It was previously known that the fibers of cotton or of flax, used in paper making were pure cellulose; and it was known to chemists that cellulose, in some form and in some combination, existed in wood; but it had never been eliminated from wood in a perfectly pure form, nor in a condition to be wrought into paper without mechanical treatment.

No witness, on behalf of the defendant, testified that any one of the processes to which reference was given in the answer of the defendants, either had produced or would produce pure cellulose from wood; nor were any of the samples of paper produced by the defendant's witnesses analyzed by their experts, to ascertain the substances of which they were composed. It was not claimed that they were pure cellulose. It was proved by the complainant's witnesses, and not denied on the part of the defense, that the fiber described and claimed in re-issued patent, No. 1448, and produced by the processes described and claimed in re-issued patent No. 1449, is pure cellulose.

While the cause was pending in the court below, a cause involving similar issues upon the same patents was heard and decided in the Eastern District of Pennsylvania. The same error in law is to be found in the opinion of that court.

One of the errors in each of these opinions is in assuming that the patent of the originator of a complete, perfect and successful invention can be defeated by any number of incomplete and imperfect experiments made at an earlier date. "The settled rule of law is," says this court, in *Agawam Co. v. Jordan*, 7 Wall., 583 (74 U. S., XIX., 177), "that whoever first perfects a machine is entitled to the patent and is the real inventor; although others may have previously had the idea, and made some experiments toward putting it in practice. He is the inventor and entitled to the patent, who first brought the machine to perfection, and made it capable of useful operation." See *Whitely v. Swayne*, 7 Wall., 685 (74 U. S., XIX., 199).

Neither of the judges below finds from read-

ing the previous descriptions, that pure cellulose fit for the manufacture of white paper was ever produced from wood prior to 1858.

The thing produced by Watt & Burgess in its purity is not found, but only an *approximately pure* or *nearly pure* substance like it.

Another error was in assuming that there could have been, in point of law, no invention of a process requiring for its successful use at all times a graduation and adjustment of heat, strength and time, which could have been the subject of a patent, without the discovery and description of such graduation and adjustment. The fallacy of this position is apparent when we consider how many of the most valuable inventions were made before the invention of any methods of measuring heat, or strength of the chemical agents. The thermometer, hydrometer, and the pressure gauge, are all of recent date. Yet there are hundreds of inventions which require the use of heat and chemicals, which were perfected before either was discovered. Almost all chemical inventions are empirical in their origin, as the Supreme Court has recognized in *Tyler v. Boston*, 7 Wall., 327 (74 U. S., XIX., 93); that is, a result is attained through chemical experiments, which could not have been foretold by *a priori* reasoning.

The cases upon patents for improvements in the arts by chemical inventions, reported in the books, are not numerous, but they all sustain the views now presented to the court.

See, *Hall's Patent*, Web. Pat. Cas., 97; *Deane's Patent*, Web. Pat. Cas., 152; *Carpmael*, Pat. Cas., 664; *Neilson's Patent*, Web. Pat. Cas., 273; *Crane's Patent*, 375; *Queen v. Neilson*, 665; *Muntz's Patent*, 2 Web. Pat. Cas., 85 *et seq.*; *Electric Tel. Co. v. Brett*, 20 L. J. (N. S.), 123; Jur., 5, 9.

In the case of *Newton v. Grand Junc. R. R. Co.*, 20 L. J. (N. S.), Exch., 427, which was a chemical invention in part, it was determined that the use of a substantial part of that in which the invention consists constitutes an infringement of the patent.

In *Corning v. Burden*, 15 How., 252, we have the definition of a process, p. 267, and in *O'Reilly v. Morse*, 15 How., 62, the interpretation of the *Neilson* patent, cited pp. 115, 117. In *Gaylor v. Wilder*, 10 How., 477, which was a case upon a patent for an invention, chemical in part, the Supreme Court determined that a single prior use of the chemical discovery which had not attracted public attention, but had passed away and been forgotten, would not invalidate a patent for the same discovery by an original inventor, and that if such prior discovery is made and put in use abroad, it cannot be put in evidence to destroy a patent in this country, unless it has been made known to the world in some printed publication.

See, also, *Tilghman v. Werk*, 2 Fish., Pat. Cas., 229; *McLean and Leavitt, JJ.*; *Tilghman v. Mitchell*, 2 Fish., P. C., 518; *Nelson, J.*; *Hills v. Evans*, 8 Jur. N. S., 525; *Seymour v. Osborne*, 11 Wall., 516, 555 (78 U. S., XX., 38, 42).

The case of *Young v. Fernis*, 10 L. T. (N. S.), 861, is one of the first importance in relation to chemical inventions. The head note is as follows:

"Where a patent has been taken out for improvements in the mode of producing chemical
see 23 WALL. U. S., Book 23.

substance, it is no bar to the legal validity of the patent, that the subject of the patent is a product already known to scientific men, provided that the patentee is the first person who has produced the substance in sufficient quantities to make it a marketable article.

The inventor of a substance, within the meaning of the patent laws, is the man who discovers the mode of producing it in such a form and to such an extent as to make it useful to the public at large.

It is no bar to the validity of a patent for improvements in the mode of producing a particular substance, that similar processes have been employed to produce analogous substances, when the subject-matter of the production is a chemical product, and the process is a chemical process.

When the subject-matter of an alleged invention is an improvement of a chemical process for the production of a substance, a patent specifying a particular limit of temperature in a process may be valid."

See, *Hills v. London Gas-Light Co.*, 5 H. & N., 312; *Hills v. Evans*, 8 Jur., 526; *Steiner v. Heald*, 6 Exch., 607; *Muntz v. Foster*, 2 Web., Pat. Cas., 96.

The object or purpose is to be taken into view in the consideration of every chemical invention and the construction of the patent for such invention.

Mowry v. Whitney, 14 Wall., 620, 643 (81 U. S., XX., 860, 863.)

The finding of the court below is inconsistent, in matters of law, with these rules of law and of construction.

Two other defenses were fully argued in the court below, and will probably be reproduced here. These were: 1. That the patent was improperly re-issued in two parts. 2. That the re-issued patents are not for the same invention as the original patent. That the re-issue was properly taken in two parts, is settled by the decision of this court in the case of *Rubber Co. v. Goodyear*, 9 Wall., 797 (76 U. S., XIX., 569), affirming a number of decisions made in the circuit court on the Goodyear patents.

The case cited also disposes of the defense, rather hinted at than taken, in the answers of the defendants, that the re-issue of 1858, and the re-issues Nos. 1448 and 1449, of 1863, were improvidently issued by the Commissioner of Patents, and were improperly obtained by the patentees.

The re-issued patents are for the same invention as the original patent.

The first requisite in every re-issue is, that it should be for the same invention as the original; and the first inquiry under this requisite has been held to be, whether the specifications are consistent or whether there is any positive conflict or inconsistency between them as a matter of law.

Sickles v. Evans, 2 Fish. Pat. Cas., 417; *Carrhart v. Austin*, 2 Fish. Pat. Cas., 543; *Goodyear v. Rub. Co.*, 2 Fish., 499.

Whether this proposition is correct, as applicable to all cases of the re-issue of patents, as well those of chemical as mechanical inventions, may be questioned; but it is not important to question it in the present case. The specifications of both the original and the re-issued patents relate to the manufacture of paper

pulp from wood by purely chemical agencies. The pulp thus manufactured is identical in each. The chemical agencies are the same, heat and alkali, with or without chlorine; and the sole question is, whether the inventor had the right to give the directions for the use of these agents, which we find in the re-issues, for the production of the same article, the paper pulp described in the specification, and claimed as a new product in re-issue No. 1448.

The re-issues are, in point of fact, only more precise descriptions of the same invention and of the mode of working it.

The original specification of the American as well as of the English patent was defective in many particulars, among which are the following:

1. It did not set forth with sufficient distinctness the strength of the alkali to be used. This strength, it says, "Being dependent on the nature of the vegetable substances operated on, can only be learned by experience." It merely indicates that a certain strength for deal or fir wood "answers very well."

2. It does not set forth the length of time for which the boiling must take place, either for the open boiling or the pressure boiling. It is said to be "dependent on the nature of the vegetable substances to be treated."

3. When boiling under pressure is used, it does not state the amount of pressure nor the temperature which is found best fitted for producing the result.

4. It does not distinguish clearly between the results of the open boiling and the pressure boiling.

5. It does not give directions for the treatment of any other than resinous woods, deal or fir.

6. It does not set forth and claim the product, the pulp obtained, as a new manufacture.

7. It does not claim separately, both the open boiling and the pressure boiling.

8. It errs in using language concerning pressure boiling, which might be construed into a disclaimer, not only of the discovery of it, but of the advantages of its use.

Some portions of the specification are so uncertain and indistinct, that it is doubtful if it could have been sustained on account of its not giving sufficient directions for the use of the invention; and for the other reasons it might, too, have been declared inoperative and invalid. *Tyler v. Boston*, 7 Wall., 327 (74 U.S., XIX., 93).

The re-issue of 1868 was designed to correct many of these uncertainties and omissions, and the carefully prepared re-issues of 1868 were intended to remove the whole of them.

The first variation, about the size of shavings or cutting, is of not the slightest importance.

In the variations of the next paragraph from the original specification, four of the eight points, in which this specification was defective, are attempted to be corrected.

1. The omission to state the difference in treatment required between resinous and non-resinous woods.

2. The omission to state the strength of the alkaline solutions required for the two kinds of woods.

3. The omission to state with precision the kind of vessel in which the boiling should take place; and,

4. The omission to state whether pressure or open boiling was the better.

Thus, the first new phrase of any significance directs that "The boiling should take place in a suitable boiler, under pressure." The second points out the difference in the treatment of resinous and non-resinous woods, and indicates the strength of alkali for each. The omissions to state the different mode of treatment required for non-resinous woods was a clear defect, which it is the province of a re-issue to supply.

The next alteration is in the substitution of the words "essential importance" for "considerable service." The words "service" and "importance" are used as synonymous. When the quickest and most economical and, consequently, the best mode of using the invention, was by pressure boiling, the word first used was calculated to mislead, and it was the duty of the inventor to substitute a word which should not mislead. This is the whole effect of that alteration, which appears also in the first re-issue.

Then follows a definition of the words "under pressure" which were in both the original and re-issued patents, and a clause supplying an omission in the original patent, by giving a direction as to the time of conducting the operation. Without these amendments the original patent might have been declared inoperative and void.

Pressure, in performing the operation indicated in the original patent, could only be caused by heat; and if they knew the degree of heat or the number of pounds of pressure corresponding to the degree required for effecting the chemical changes, they were bound to set forth either one or the other or both, at the peril of losing the protection of their patent. If they did not know either at the time of taking their patent, but learned one or both from experience in working their invention, it was their duty to surrender the patent and amend the specification so as to include the knowledge which they had thus acquired. This is just what has been done in this case and no more; "under pressure" is a vague and indefinite phrase, and is now defined so as to be clear and certain in its meaning. The length of time, which was left also indefinite in the original specification, is made as specific as possible. A minimum and maximum are given both for the degree of heat and length of time. This amendment was made on the first re-issue.

The next addition is a direction of the best mode of removing the pulp from the boiler. This is no part of the invention or of the claims. It is merely directory as to the best mode of performing an operation incident to the use of the invention.

The phrase, "We do not claim this operation as a part of our invention," is dropped altogether. It means simply that they do not claim to have been the inventors of pressure boiling, and as no such pretension is made in the claim proper, it is mere surplusage in the specification.

In the original specification several phrases are used for one and the same substance. In the introduction, the invention is said to consist of improvements in pulping and disintegrating vegetable substances. In the claim, it is the pulping and disintegrating of shavings of wood and other similar vegetable matter. In the first

paragraph of the specification, the material is spoken of as shavings or cuttings, and as shavings alone, and again as damp shavings; and the result is spoken of as a pulpy mass of dark brown color, and as the pulp thus obtained. In the amended specification, the synonymous phrases of wood and other vegetable substances and wet mass of woody or vegetable pulp, are uniformly used. This is but a formal variation.

The remainder of the amended specifications is a further direction about the treatment of resinous and non-resinous woods. Non-resinous woods will be pulped at the first stage of the operation, and the pulp may be at once bleached and run into paper. For resinous woods the subsequent treatment is substantially the same as in the original specification. The most careful examination will not detect any material difference.

The second claim of the re-issued patent is also substantially the same as that of the original patent, with the addition of the words "under pressure." The same reason existed for inserting the words here as in the direction about boiling. The second washing in alkali without pressure, was found to be of no importance, and it does not appear in the claim, although described in the specification.

The first claim is for the first boiling process by which non-resinous woods are pulped, and which is the preparatory process in the pulping of resinous woods.

No new or distinct invention is inserted, but the fact is stated that, with regard to non-resinous woods, the first treatment with alkali and a high degree of heat is sufficient to produce the pulp, and that the chlorine treatment is unnecessary. What the original specification describes as necessary for all kinds of woods, is, by the amended specification, confined to such woods as are mentioned in the original, viz.: deal and fir, and other resinous woods, and is stated not to be essential for non-resinous woods. The amendment consists in teaching the workmen, while working with non-resinous woods, to omit certain originally described operations as unnecessary. This proves, therefore, that the case was pre-eminently one for a re-issue within section 13 of the Act of 1836; for, by reason of a defective or insufficient description or specification, the patent might have been declared inoperative and invalid for the protection of the process of making pulp from non-resinous woods. The original patent took for its field of invention all kinds of wood; the re-issued patent defines with greater precision the treatment for different kinds of wood, and the product—the result—remains the same—a wood pulp suitable for the manufacture of paper. By using more specific language in the re-issue, the invention is narrowed, not enlarged.

The true question, it is submitted, is, whether the original experiments were such as to enable the inventor to practice his invention and state the conditions of it intelligibly, and whether he has done more than to make a more accurate description of these conditions in his re-issued patent. Of course Watt and Burgess did not know, and no other chemical inventors have ever known, all the conditions, and hence not the best conditions, for the practical use of their inventions, at the time when they first undertook to describe them. There is not an

original patent for a chemical invention of any value that has not been defective and requiring re-issue or disclaimer, for the reasons already stated. It is too much the custom with such inventors to rush at once to the Patent Office and obtain a patent upon crude and insufficient experiments and statements. But as a general rule, the inventor knows, better than anyone else, when his invention is accomplished; when his experiments cease and his knowledge begins; and in the absence of fraud or of any conflicting interest, his statement should be conclusive.

Another error of the adverse opinions is in confounding the weights, measures and details of the process with the result of the observation, with the invention itself. The process was completed before the hydrometer, the thermometer, the pressure gauge or the chronometer were applied to it. When the inventor discovered that perfect pulp could be produced in a short time by the action of alkali and high heat upon wood, at one operation, the invention had become accomplished. The subsequent graduation of these elements, to obtain the most economic results, might have been done by other persons as well as the inventor. They are merely methods of working the invention, which might have amounted to improvements, but which do not alter the character of the invention itself. And it sounds most strangely illogical to say that an inventor must lose the rewards due to a great and most valuable discovery because he has in a re-issued patent described, with the particularity which the law requires him to do, the best methods of working his invention.

It is my view of the law, that when an inventor, and especially a chemical inventor, finds, in the course of working his invention, that he can give a better description of the details of it than he was originally able to give in his specification; that it is not merely his privilege but his duty to surrender the original patent and take a re-issue containing the more perfect description. Indeed it has been said by a learned judge in *French v. Rogers*, 1 Fish. Pat. Cas., 187, that "It is for the public interest that the surrender and re-issue should be allowed to follow each other, just as often as the patentee is content to be more specific or more modest in his claims."

The Keene patents are for the boilers in which the wood is boiled in alkali under pressure. The first, dated Sep. 18, 1859, claims a boiler of a peculiar construction, described, with an expansion chamber, stirrers and discharge valve or cock arranged for the purposes described. These purposes are: (1) For the boiling of the mass in the most thorough manner, keeping it stirred or in motion, so that all parts shall be acted upon by the heat equally. (2) For the discharge of the disintegrated mass under pressure through the discharge valve, into the tank where it is to be washed.

The second patent, dated June 16, 1863, is also for a boiler, to be used for the same general purpose as the first, but without the stirrers, and with an original arrangement of devices for charging, and also for blowing off the contents.

The infringement of these patents is proved by various witnesses. One witness says the

"feed-hole" was below the diaphragm, not through it. But the discharge cock was in the same place and performed the same duty as in Keene's.

The judge says: "There remain to be considered the two boiler patents which are set out in the bill. As to those, it seems sufficient to say that the first boiler patent of Keene, No. 25418, is for a combination, of which the stirrers described are a material part. The evidence shows, however, that the stirrers are not used by the defendants. Not using the plaintiffs' combination, they do not infringe their patent."

But the proof is clear that they had infringed the patent for a long period prior to the commencement of the suit by using the stirrers, as well as the rest of the combination. The proof of a single act of infringement, prior to the commencement of the suit, entitles the complainants to a decree.

He proceeds (6 Blatchf., 33): "The second boiler patent of 1863, No. 38901, is for a combination of which the diaphragm and well are material parts. The defendants use no well with the diaphragm, but charge their boiler below the diaphragm. There is, then, no use of the plaintiffs' combination secured by the patent. So far, then, as the plaintiffs' case rests upon these two boiler patents, it must fail."

But this patent has two arrangements of devices in connection with the boiler for two very different purposes; one purpose is to charge the boiler so that there shall be no refuse or waste, and this is accomplished by making a feed-hole or well into the boiler through the diaphragm, so that the chips or other stock shall fall directly into the boiler when the cover is removed. Precisely the same purpose is accomplished in the defendants' boiler by making a feed-hole or well just below the diaphragm, and pushing the stock through it into the boiler. Here are the three elements of the combination: the boiler, the perforated diaphragm and the feed-hole, arranged so as to accomplish precisely the same purpose as in Keene's boiler, although not in so simple a manner. Each element is not only the "substantial equivalent" of the corresponding device in the other, but it is precisely the same, although the place, not the function, of one of the elements is changed. Construing the patent with the object of the invention in view (*Mowry v. Whitney*, 14 Wall., 645 (81 U. S., XX., 863)), the combination of devices in the defendant's apparatus is precisely the same as that covered by the first claim of the Keene patent of 1863.

But there is another combination of devices in Keene's apparatus for a different purpose, and which is the subject of the second claim of the patent. That purpose is for the discharge of the contents of the boiler when the intercellular matter of the wood has been removed. The mode of charging the boiler, and the devices by which the charging has been accomplished, have nothing to do with this second object.

The boiler may have been filled in any manner, so that it be filled and its contents ready to be discharged. The well is certainly no part of this combination. It is not questioned that the devices for discharging the boilers in the defendant's apparatus are identical with those which are the subject of the second clause of

this patent, and operate in combination in the same way and for the same object.

The Mellier Patent

Although notice was given in the answer that reference would be made to Wright's patents, and to the extract from the *Centr. B. 1872*, to prove the want of novelty in the invention patented by Mellier, yet, the experts called by the defendant have taken no such ground, and the validity of the Mellier patent stands unimpeached.

The only questions to be determined upon this patent, therefore, are those of construction and infringement. It is for a process, a new and useful improvement in making paper pulp.

"The straw or other fibrous materials requiring a like process to prepare the same for the paper manufacture, is first, as heretofore, to be cut in a chaff-cutting or other machine into short lengths, and to be freed from knots, dirt or dust, and then steeped for a few hours in hot water. The straw or fibrous materials and a weak solution of caustic alkali are then to be placed in a suitable close boiler, heated by steam, as hereinafter explained, and the heat is to be raised to such a degree as to attain and maintain for a time a pressure internally of the boiler, equal to or exceeding seventy pounds to the square inch—that is, about 310° of Fahrenheit—by which means a considerable saving of alkali, as well as time and fuel, results, as compared with the means of using a hot solution of caustic alkali, as now practiced in preparing straw and other fibers for paper makers.

By means of submitting the straw or other similar fibrous materials to the pressure of between 70 and 80 pounds to the square inch inside of the boiler, I can reduce considerably the proportion of alkali; and the solution which I prefer to use is to be from two to three degrees of Baumé, or of a specific gravity of from 1.013 to 1.020, and at the rate of about seventy gallons of such solution to each cwt. of straw or other fibrous vegetable matter requiring like treatment."

The claims of the patent are as follows:

"Having thus described the nature of my said invention, and the manner of performing the same, I would have it understood that I do not claim the general use of caustic alkaline solution, nor the employment generally of a close boiler for boiling straw or other vegetable fibrous substances."

"But what I claim as my invention, and desire to secure by letters patent, is the use of a solution of caustic soda (NaO) in a compartment of a rotary vessel separate from that which contains the steam heat, substantially as described."

"I also claim the within described process, for bleaching straw, consisting in boiling it in a solution of pure caustic soda (NaO) from 2° to 3° Baumé, at a temperature of not less than 310° Fahrenheit, after it has been soaked and cleansed and before submitting it to the action of the solution of chloride of lime, from 1 to 1½ degrees, substantially as described."

Some confusion has arisen in the construction of this specification, from the fact that it speaks of a pressure of seventy pounds being equivalent to a temperature of 310°. But the claim is confined to the temperature, and the pressure is spoken of only as a means of meas-

uring it. The temperature of the contents of the boiler during its action cannot be readily measured by a thermometer, and it is generally ascertained by comparing the tables of steam pressure with the tables of temperature.

The oldest and best known of these is called "The French Tables." By these a pressure of seventy pounds corresponds very nearly to the temperature of 310° F. Mellier says: "The heat is to be raised (after the materials are placed in the boiler) to such a degree as to attain and maintain for a time a pressure internally of the boiler, equal to or exceeding seventy pounds on the square inch; that is, about 310° of Fahrenheit." etc.

In another part of the specification he says:

"A steam-gauge properly fixed upon the boiler will enable one to ascertain when the pressure has attained the required degree."

The claim is for the use of high temperature, and is not qualified or made obscure by the mode of measuring that temperature.

It appears that the French tables start from a vacuum at zero, and give the entire internal pressure corresponding to the temperatures; whereas, our steam-gauges only indicate the difference between the pressure of the atmosphere and the entire internal pressure. This statement is not contradicted or varied, and is the actual fact. To ascertain the entire internal pressure upon the contents of the defendant's boilers, the weight of the atmosphere, averaging 14½ pounds, must be added to the pressure indicated by the steam-gauges.

The mode of measuring the degree of temperature by pressure or otherwise was no part of Mellier's invention. It was a matter to be learned from the books. Mellier wrote for those skilled in the use of high pressures and steam-gauges, and he took for granted that everyone who used his invention would know, as he ought to know, that all ordinary steam-gauges worked against the pressure of the atmosphere. Hence he is very precise in stating that the pressure which he referred to was the pressure within the boiler, not the difference between the internal pressure of the steam and the external pressure of the air. Thus he says, in the passage above quoted: "The heat is to be raised to such a degree as to attain and maintain for a time a pressure internally of the boiler, equal to and exceeding seventy pounds to the square inch;" and again, "By means of submitting the straw or similar fibrous materials to a pressure between 70 to 84 pounds to the square inch inside the boiler," etc. He says, also, "a steam-gauge properly fixed upon the boiler will enable one to ascertain when the pressure has attained the required degree." How? Not by anything upon the gauge itself, because that only indicates pounds. The pounds are to be turned into degrees, and that can only be done by reference to the tables then in use. The specification gives but one of the corresponding readings from these tables, 70 lbs. equals 310° F. and in precise, unambiguous language, refers to the internal pressure.

This construction has been affirmed by judicial decision in the case of the present complainant *v. Hest*, in the Eastern District of Pennsylvania; see, also, opinion of Judge Hall of the Northern District of New York; *Amer. Wood Paper Co. v. Glens Falls Pap. Co.*, 8 Blatchf., 513.

See 23 WALL.

Messrs. R. W. Russell and S. D. Law, for Fiber Disintegrating Company:

The original Watt & Burgess American patent of 1854, was invalid, because it was not for the same invention as that described in the English provisional specification, filed Aug. 19, 1853, to which date the American patent has relation.

The same objection applies, with even greater force, to the re-issued patents of 1863.

An English patent is granted, upon the condition that if the patentee shall not particularly describe and ascertain the nature of the invention, and in what manner the same is to be prepared, by an instrument in writing, under his hand and seal, and cause the same to be filed in the great seal office, within six months after the date of the patent, it is to be void. *O'Reilly v. Morse*, 15 How., 108.

The English patent was granted Oct. 27, 1853, and the final specification, filed Feb. 18, 1854, recites the previous granting of the patent, which patent was for the invention described in the petition and provisional specification.

This final specification is not for the invention described in the provisional specification, and the English patent is for that reason, under the decisions in England, void.

Byrne, Patents, 83, London, 1860; *Harmer v. Playne*, 11 East, 101; *Bovill v. Moore*, 2 Marsh, 211; *Brunton v. Hawkes*, 4 B. & Ald., 541; *Campion v. Benyon*, 6 J. B. Moore, 71; *Bloxam v. Elsee*, 6 B. & C., 169.

The process described in this final specification is not the process described in the petition and provisional specification.

After going through the farce of copying the provisional specification, the final specification proceeds to describe the invention.

The very first step of the process described in the provisional specification, the use of sulphurous acid, is dropped altogether; and instead of relying upon the action of sulphurous acid, followed by chlorine to bleach and disintegrate the fibers, and then applying a warm and dilute solution of caustic soda or potash to complete the process, the patentees proceed to describe the following process as their invention: 1. The wood shavings, etc., are to be boiled in a solution of caustic alkali of enormous strength. 2. Chlorine is applied. 3. A weak solution of caustic alkali.

It thus appears that between Aug. 19, 1853, and Feb. 18, 1854, Messrs. Watt & Burgess entirely changed their proposed process, but probably not being willing to lose the fees paid on the provisional specification, or desiring to date back their claim of invention to Aug. 19, 1853, to cut out other inventors, they filed the final specification in question. As the invention described in that provisional specification is not the same as that described in the American patent of July 18, 1854, the antedating to Aug. 19, 1853, is fatal to the American patent.

The authority of the Commissioner of Patents to antedate a patent is given by the Act of 1839, section 6, which directs the patent to be limited to the term of fourteen years from the date or publication of the foreign letters patent, for the same invention or discovery.

It was a fraud to represent that the English patent was for the same invention as that described in the American specification, and thus to get the benefit of the antedating to Aug.

19, 1853, and of the legal presumption that the invention described in the patent of 1854 was invented as early as Aug. 19, 1853, so as to cut out intervening patents, etc.

Comparing the re-issued patents of 1863 with the English specification of Aug. 19, 1853, it is most manifest that they are not for the same invention.

The process described in the first claim of the re-issued patent of 1863, is to be applied to every kind of vegetable fibrous substance, except resinous woods, and in that process there is to be no disintegration by sulphurous acid nor by chlorine; on the contrary, the disintegration is to be effected by the sole agency of caustic alkali and high pressure boiling.

As to the second claim, respecting a process for resinous woods, it would be immaterial, even if it referred to a process like that of the original specification; the fact would remain that the patent is, as to the part covered by the first claim, a patent for an invention not described in the provisional specification.

The English patent is void because the first specification is for an invention different from that afterwards described.

And the American patent is void because it relates back to the first English specification, and falsely claims to be for the invention therein described.

The re-issued Watt & Burgess patents of 1863 are invalid, not being for the same invention as that patented in the original patent of 1854, and being in part for an invention disclaimed by the patentees in the original patent. Plaintiffs are estopped by that disclaimer.

Two patents were issued bearing the same date, one for a process, the other for a product or manufacture.

1. *As to the re issued patents for the process.*

The first claim of this patent totally omits the whole of the process described in the first patent, and claims another invention, viz.:

"The process of treating wood or other vegetable substance by boiling in an alkali under pressure as a process, or preparatory process, for making pulp for the manufacture of paper from such woods or other vegetable substance substantially as described."

The second claim in the process patent, which is omitted in the product patent, appears to have been inserted for the purpose of keeping up a show of some kind of resemblance to the original patent of 1854. But that second claim relates exclusively to the treatment of resinous woods, while the first claim includes any vegetable substance.

2. *As to the patent for the product.*

It describes the process by which the product is to be made. It is exactly the same process as that set forth in the process patent.

The claim is for "A pulp suitable for the manufacture of paper made from wood or other vegetable substance, by boiling the wood or other vegetable substance in an alkali under pressure substantially as described."

The theory of the plaintiff's counsel is, that one who obtains a patent for a chemical process may, after trying it and discovering its defects, re-issue the patent and make the necessary corrections, deductions and additions, so as to make the patent read for the improved process. Plaintiff's counsel go further, and contend that

it is the duty of the patentee to adopt that course, so as give the public the benefit of his more recent discoveries. We maintain, on the contrary, that it is for the inventor to take out a new patent for his newer invention, and that he has no right to re-issue the old patent to antedate the new invention, for thereby he would shut out the intermediate inventions, and also avoid the necessity of taking an oath as to believing himself to be the inventor of the new method; he or his assignee has only to swear generally that there is some defect when a re-issue is applied for.

The law does not allow the inventor to take the course which the plaintiff's counsel say he ought to take, for the law only authorizes a re-issue for the same invention with a more perfect description, or the abandonment of an over-claim.

The commissioner has no legal power or authority to re-issue a patent for an invention different from that of the original patent. This is a jurisdictional question. The validity of the patent depends upon it. The decision of the commissioner as to the identity of the invention, is no more conclusive than his decision that the patentee is the inventor, or that the assignee has proved his title.

Judge Story appears to have considered that the question was not examinable. "Unless it appear on the face of the patent that he (the Commissioner of Patents) has exceeded his authority," by granting a re-issue for an invention not the same as that described in the original patent. *Woodworth v. Stone*, 3 Story, 749.

But Judge Woodbury held that evidence was admissible to show that the original patent did not cover the invention claimed in the re-issue. *Allen v. Blunt*, 2 Wood. & M., 121; *Stimpson v. R. R. Co.*, 4 How., 380; *O'Reilly v. Morse*, 15 How., 111; *Brooks v. Fiske*, 15 How., 215; *Burr v. Duryee*, 1 Wall., 531 (68 U. S., XVII., 650).

In the following cases it was held, either that the decision of the commissioner, on granting a re-issue, should be deemed conclusive on the question as to the identity of the invention, or that the re-issue might be for an invention actually made by the patentee, although not covered by the original patent.

House v. Young, 3 Fish., 335; *Sherman, J.*; *Hussey v. Bradley*, 2 Fish., 362, Nelson & Hall, JJ. (1869); *Whitely v. Swayne*, 4 Fish., 123, Leavitt, J.; *Am. Wood Paper Co. v. Heft*, 3 Fish., 316; and see, *French v. Rogers*, 1 Fish., 133; see, also, *Woodward v. Dinsmore*, 4 Fish., 163.

In the following cases it was considered that the re-issue is void when, upon a comparison between it and the original patent, it is seen that they are different inventions.

Carhart v. Austin, 2 Fish., 543; *Poppenhusen v. Falke*, 2 Fish., 181; *Potter v. Holland*, 1 Fish., 382; *Middletown Tool Co. v. Judd*, 3 Fish., 141; *Chicago, etc., Co. v. Busch*, 4 Fish., 395; *Parham v. Am. Buttonhole Co.*, 4 Fish., 468.

In the following cases it was held that the re-issue must be confined to the invention covered by the original patent.

Knight v. Balt. & O. R. R., 3 Fish., 1; *Good-year v. Berry*, 3 Fish., 439.

In the last cited case the court says that, according to the late cases, the decision of the commissioner is open to examination.

Hoffheins v. Brandt, 3 Fish., 218; *Dyon v.*

Danforth, 4 Fish., 133; *Brown v. Selby*, 4 Fish., 363; *Seymour v. Osborne*, 3 Fish., 555.

In the last cited case the court states that the more recent decisions hold that the propriety and legality of the re-issue are examinable.

In *Eureka Co. v. Bailey Co.*, 11 Wall., 488 (78 U. S., XX., 209), it was held that "It may be shown, in a suit on a re-issued patent, that it covers matter not part of the original invention."

The invention patented on a re-issue must be shown or suggested in the original specification.

Sarven v. Hall, 9 Blatchf., 524.

The issue of two patents in lieu of one was not authorized, as they are not for distinct and separate parts of the thing patented.

The process and product together constitute but one invention, of which there are no distinct and separate parts.

See *Vance v. Campbell*, 1 Black, 427 (66 U. S., XVII., 168); *Woodworth v. Hall*, 1 Wood. & M., 248.

The re-issued patents are too broad, there being at all events no novelty in boiling some vegetable substances in a solution of caustic alkali under pressure at or near 300° F., for the manufacture of paper pulp therefrom.

If the novelty consists in the use of a single stage chemical process, then the plaintiff's case fails, as the defendant does not use that process but a totally different one, viz.: a compound process, whereby the woody matter is reduced to pulp before the final alkali treatment.

The Boiler Patents.

Keene's boiler patent of 1859 is for a combination of stirrers, of a particular form, with an ordinary expansion chamber and discharge valve.

Keene's Boiler Patent of 1863.

The claims in this patent are as follows:

1. "A boiler provided with a perforated diaphragm and well, or their substantial equivalents, arranged in the manner and for the purpose described.

I also claim, in combination with the boiler, the arrangement of the discharge pipe and valve for the purpose of drawing out or discharging the contents of the boiler under pressure substantially as and for the purpose set forth."

The patent declares the invention to be as follows: "My invention consists in connecting the man or feed-hole in the shell of the boiler with the man or feed-hole through the diaphragm by a perforated well or cylinder, so that the material can be charged through said well into the boiler, without falling upon or clogging the perforated diaphragm."

Defendants do not use the contrivance but charge the boiler through a man-hole below the diaphragm.

Each of the two boiler patents is for a combination of old contrivances.

And there is no pretense for saying that the defendants use all the elements of either of those combinations.

There is no infringement of a patent for a mere combination, unless all the elements of the combination are used.

Prouty v. Ruggles, 16 Pet., 336; *Carver v. Hyde*, 16 Pet., 513; *Stimpson v. R. R. Co.*, 10 How., 345; *Byam v. Eddy*, 2 Blatchf., 521; *Rich v. Cowe*, 8 Blatchf., 41; *Eames v. Godfrey*, 1 Wall., 78 (63 U. S., XVII., 547).

See 23 WALL.

The Mellier Patent.

Mellier was not the first to discover the utility of the use of a steam pressure as high as seventy pounds in boiling fibrous materials in a solution of caustic alkali, for the manufacture of paper pulp; and even if he had been, he could not take a patent for that use alone, as prior patents call for the use of such high pressure boiling without limit.

The complainants are estopped by the allegation in their bill that Watt & Burgess preceded Mellier.

Mr. Justice Strong delivered the opinion of the court:

Though the two re-issued patents were granted on the same day and to the same patentees, and though they are both substitutes for the one original patent granted July 18, 1854, antedated August 19, 1853, they are to be carefully distinguished one from the other. The first (No. 1448) is a patent for a product or a manufacture, and not for any process by which the product may be obtained. The second (1449) is for a process and not for its product. It is quite obvious that a manufacture, or a product of a process, may be no novelty, while, at the same time, the process or agency by which it is produced may be both new and useful—a great improvement on any previously known process and, therefore, patentable as such. And it is equally clear, in cases of chemical inventions, that when, as in the present case, the manufacture claimed as novel is not a new composition of matter, but an extract obtained by the decomposition or disintegration of material substances, it cannot be of importance from what it has been extracted.

There are many things well known and valuable in medicine or in the arts which may be extracted from divers substances. But the extract is the same, no matter from what it has been taken. A process to obtain it from a subject from which it has never been taken may be the creature of invention, but the thing itself, when obtained, cannot be called a new manufacture. It may have been in existence and in common use before the new means of obtaining it was invented, and possibly before it was known that it could be extracted from the subject to which the new process is applied. Thus, if one should discover a mode or contrive a process by which prussic acid could be obtained from a subject in which it is not now known to exist, he might have a patent for his process, but not for prussic acid. If, then, the Watt & Burgess patent for a product is sustainable it must be because the product claimed, namely: "a pulp suitable for the manufacture of paper, made from wood or other vegetable substances," was unknown prior to their alleged invention. But we think it is shown satisfactorily that it had been produced and used in the manufacture of paper long before 1853, the year in which the original patent of Watt & Burgess was dated.

The pulp out of which paper is made, whether obtained from wood or other vegetable substances, is a fibrous material, consisting of what is called in chemistry "cellulose." As such, in its natural state, it is combined with other substances called intercellular matter, which must be removed to render the cellulose

fit for being made into paper. It was well known before 1853 that the fibers of cotton or flax were pure cellulose, and that cellulose existed also in straw or wood, but that it had not, so far as is known, been extracted from wood by chemical agencies alone, nor brought into a condition to be wrought into paper without mechanical treatment. He said even the fibers of cotton and of flax, though pure cellulose, required disintegration in order to reduce them to a pulp suited to fit in paper. This was usually effected by mechanical means, by a rag beating machine; but when thus effected a product had been obtained adapted to the manufacture of paper, a fibrous pulp, the same in kind, and capable of the same uses, as that obtained from straw or wood.

So a pulp had been produced from straw and some varieties of wood by various processes, many of them doubtless cumbrous, and all of them perhaps much inferior to the process of Watt & Burgess. This is shown by the patents given in evidence, and it has been admitted during the argument.

It is insisted, however, that the paper pulp which had been produced before the invention of Watt & Burgess was not pure cellulose, that it was only approximately pure, and from this it is argued that the pure article obtained from wood by their process is a different and new product or manufacture. Whether a slight difference in the degree of purity of an article produced by several processes justifies denominating the products different manufactures, so that different patents may be obtained for each, may well be doubted, and it is not necessary to decide. The product of the complainants' patent is a pulp suitable for the manufacture of paper and, confessedly, to make white paper it requires bleaching. The pulp which had been obtained by others from rags in large quantities, and from straw, wood and other vegetable substances to a lesser extent, was undeniably also cellulose, suitable for manufacturing paper and, so far as appears, equally suitable. The substance of the products, therefore, was the same, and so were their uses. The design and the end of their production was the same, no matter how or from what they were produced.

It is freely admitted that the patent of an originator of a complete and successful invention cannot be avoided by proof of any number of incomplete and imperfect experiments made by others at an earlier date. This is true, though the experimenters may have had the idea of the invention, and may have made partially successful efforts to embody it in a practical form. And though this doctrine has been more frequently asserted when patents for machines have been under consideration, we see no reason why it should not be applied in cases arising upon patents for chemical products. But the doctrine has no applicability to the present case. What had been done before the Watt & Burgess invention was more than partially successful experimenting. A product or a manufacture had been obtained and had been used in the arts, a manufacture which was the same in kind and in substance, and fitted for the same uses as the article of which the complainants now claim a monopoly. That this manufacture may have been the product of one or more different processes is, as we have said, quite immaterial in considering the question whether

it is the same as that produced by the complainants.

It has been, however, argued that the product of the complainants' process and the product claimed as a new manufacture is cellulose, of the proper consistency and dimensions, and with a fiber of a proper length for immediate felting into paper while the cellulose obtained from rags or wool or other vegetable substances, by other processes than that of the Watt & Burgess patent, had a longer fiber, and required, in addition to chemical agency, mechanical treatment to prepare it for use in paper making. Hence, it is inferred the product is a different one, that it is properly denominated a new manufacture, and that it was patentable as such.

This argument rests upon a comparison of the finished product of the complainants with an article in an intermediate stage, and while undergoing treatment preparatory to its completion. It may be quite true that at some stage of its preparation the paper pulp made and used before 1853 was not of the proper consistency for paper making, or that its fiber was too long, and that it required additional manipulation to fit it for use. But when it had received that treatment, its fibers were reduced to the proper length, and it became capable of all the uses to which it is claimed the product of the complainants is adapted. It is with the finished article that the comparison must be made and, being thus made, we are of opinion that no substantial difference is discoverable.

It may be that if the cellulose which had been produced prior to 1853, of such form and with such properties that it could be at once felted into paper, had been only a chemical preparation in the laboratory or museum of scientific men, and had not been introduced to the public, the Watt & Burgess product might have been patented as a new manufacture. Such appears to be the doctrine asserted in some English cases, and particularly in *Young v. Fernie*, 10 Law T. (N. S.), 861. In that case, Vice-Chancellor Stuart remarked upon a distinction between the discoveries of a merely scientific chemist, and of a practical manufacturer who invents the means of producing in abundance, suitable for economical and commercial purposes, that which previously existed as a beautiful item in the cabinets of men of science. "What the law looks to," said he, "is the inventor and discoverer who finds out and introduces a manufacture which supplies the market for useful and economical purposes with an article which was previously little more than the ornament of a museum." But this is no such case. Paper pulp obtained from various vegetable substances was in common use before the original patent was granted to Watt & Burgess, and whatever may be said of their process for obtaining it, the product was in no sense new. The re-issued patent, No. 1448, is, therefore, void for want of novelty in the manufacture patented.

The re-issue, 1449, is for a process to obtain pulp from wood or other vegetable substances for the manufacture of paper. It consists in boiling the wood under pressure in a solution of caustic alkali, with such an adjustment of the strength of the solution, of the pressure, and of the time of boiling as to produce the pulp ready

for washing and bleaching at a single operation. It is in the main, if not entirely, a chemical process, and it differs from all processes for obtaining paper pulp known before 1858, when the original patent to Watt & Burgess was dated, in this particular: that it produces the pulp ready for bleaching or for use in a single operation. In all processes prior to that date, successive operations were necessary in order to obtain a pulp fitted for use in making paper. These were in part mechanical, sometimes wholly so. In some cases the vegetable substances had been boiled in alkalies in open or closed boilers, under pressure, or without pressure. To this treatment, disintegration by mechanical means was added, and in no case had a suitable pulp been produced by chemical agency and in a single stage of treatment. It must then be admitted that the process described in this re-issue was unknown before 1858, and if then invented by Watt & Burgess, it was patentable to them. Whether it was in fact patented to them is another question. It is, we think, fairly established by the testimony of Hugh Burgess, one of the original patentees, that in 1851 or 1852 he produced a good pulp by boiling wood in a caustic alkali at a high pressure. The witness does not, however, state that this production was the result of a single process. His description of his experiments is very significant. It is as follows: "I found that some wood required much more alkali than others. I found that when intercellular matter was not wholly removed by caustic alkali, it could be decomposed by chlorine, or the hypochlorides; one answering the purpose as well as the other. I used, therefore, chlorine or bleaching powder, preferably chlorine, since one of the products attending the elimination of chlorine, namely: sulphate of soda, had a marketable value in England. I found that to a certain extent, and when desirable, I could substitute caustic alkali for chlorine, the one for the other; but the nature of the wood under treatment materially affected this substitution. I found the greater the quantity of intercellular tissue removed by the caustic alkali, the less chlorine or its compounds with oxygen was required, and, consequently, the higher the temperature and pressure; and the greater the strength of the alkali employed, the less of the intercellular tissue was left and, consequently, less chlorine or its compounds with oxygen required. But if sufficient caustic alkali was employed at a requisite temperature, chlorine was only necessary for bleaching purposes. As regards the cost, the chlorine process appeared to cost less than the free use of alkali, since one of the products of its elimination is a marketable article in England, and we calculated on the sale of the sulphate of soda as one of the sources of profit in working the patent. In drawing up the specification for a patent, I, therefore, laid most stress on the process that seemed to offer the greatest pecuniary advantage, since the recovery of the soda-ash had not been practically tried by us at this time, and we were in uncertainty as to the success of such recovery. With the knowledge of the above facts, I was desirous of embracing in my specification the modes of producing wood pulps with caustic alkali, either with or without steam pressure, supplementing, when necessary, the alkaline boiling, with

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the subsequent treatment of chlorine or the hypochlorides."

This does not look at all like the production of pulp by a single operation, nor does it intimate any discovery of a process by which it could be effected. Such an idea seems not then to have been in the mind of the inventor. And when the schedule to the English patent, dated August, 1858, was prepared, it described a process, consisting of several stages. In that wood shavings were first boiled in caustic alkali of the strength indicated by about twelve of the English hydrometer. This process, the specification stated, was much better performed under pressure, and after the wood had been boiled about twenty-four hours it was to be well washed and squeezed to remove the alkali. The wood was then placed upon racks in a chamber and exposed to the action of chlorine, or any of the compounds of chlorine with oxygen. When sufficiently acted upon by the chlorine it was to be removed and washed, and then subjected to the action of a weak solution of caustic alkali. Only then, after these successive stages, was a pulp produced ready for bleaching. The specification of this patent is the same as that of the first American patent, granted July 18, 1854, but antedated August 19, 1858, to correspond with the English one. If it contains the germ of the process described and claimed in the re-issue, 1449, it is too evident to admit of doubt there was then in the mind of the patentees no finished conception of such a process. What they contemplated was a series of manipulations. Boiling under pressure, though preferred, was not stated to be essential. No graduation of the strength of the alkali was described. No degree of pressure was named, and no variation of the time of treatment. These are all-important to the production of pulp in one operation.

Undeniably, three successive stages of operation were described in the specification, three distinct processes, not employed contemporaneously, but following each other in order of time. And this succession in the order mentioned was considered by the patentees as essential; in fact it was claimed as their invention. In support of their application for the original American patent it was argued on their behalf that "their invention relates to a series or combination of processes, in the order in which they are stated, for treating shavings, etc." The several processes and their order was then stated thus:

1. Boiling in a caustic alkali solution until they have, by the test of washing, lost their woody taste.
2. Then, after they have been washed, subjecting them to the action of chlorine or its compounds, and oxygen.
3. Then, after another washing, subjecting them to a weak solution of caustic alkali.

"The shavings," it was argued, "must pass through these several processes, and in the order stated; and this constitutes the invention." We quote further from the argument, as follows: "The processes taken separately will not produce the article, but their sum will; and they are only claimed in their series, and not in their individual capacity. It is admitted that alkali and chlorine have been used in pulping vegetable matter, but it is not known that alkaline, chlorine, oxygen and alkali have been used in the manner and in the order in which Messrs.

well into the boiler without falling upon or clogging the diaphragm. As the defendants have not used a perforated well connecting a feed-hole in the shell with a man-hole in the diaphragm of the boiler, they are certainly guilty of no infringement of the first claim in this patent. They feed their boiler by means of a feed-hole below the diaphragm, not through it. Surely this is not a substantial equivalent for a cylindrical well from the top of the boiler through the diaphragm. Surely the patent was not intended to be for every possible means of supplying the boiler without clogging the interstices or perforations of the diaphragm. Had it been it would be void. But it is not for a result however obtained, it is for a mode of attaining a useful result. In such a case as this it cannot be maintained that because the result is the same the devices for obtaining it are not substantially different.

It is argued, however, that the defendants have infringed upon the second claim of the patent, and they undoubtedly have if the mode of charging the boiler, and the devices by which the charging is accomplished, have no relation to the asserted invention. If it be true that the second claim means nothing more than the assertion of an exclusive right to discharge any boiler in the mode described in the specification, very clearly the defendants are trespassers. But is that the true construction of the claim? We think not. It is not the arrangement of the discharge pipe and valve that the patentee claims, but it is those devices in combination with the boiler particularly described in the specification, namely: a boiler containing, near its upper end, a perforated diaphragm, with an opening in its center, and having a well connecting that opening with the feed-hole in the shell of the boiler. It may be quite true that the well and the mode of charging the boiler have no effect upon the mode of discharge, yet the claim is for a combination, of which the well is a part. Its language admits of no other construction. Hence the defendants, not having used the well, they have not used the combination.

These considerations lead to the conclusion that the appeal of the American Wood-Paper Company cannot be sustained.

It remains to inquire whether the Mellier patent is a valid one, and whether the defendants have been guilty of infringing it. Both these inquiries the circuit court answered in the affirmative and, consequently, awarded an injunction against the defendants. It is from this part of the decree they have appealed.

The difficulty of this part of the case lies in determining what was the invention of Mellier—the invention patented. The second claim of the patent (which is the only one asserted to have been infringed) is, to say the least of it, obscure. It is avowedly for a process, and a process described in the preceding specification. But what that process is which the patent describes, wherein consists its novelty and usefulness, it is not easy to define. And it is not surprising that though no less than three circuit courts have been called upon to construe the patent, a construction somewhat different has been given in each case.

In the court below, the principle of the Mellier discovery was held to be this, namely: that the effect of a solution of pure caustic soda

upon straw and such other fibrous materials could be increased by the use of it under pressure, at a temperature of not less than about 310° Fahrenheit, so as to result in the production of the nearly pure fiber without resort to any other chemical process, thereby saving both alkali and time. In the Circuit Court of Pennsylvania the discovery was, by one of the judges, understood to be that the temperature and strength of the caustic alkali solution and the duration of the boiling could in practice be so graduated and adjusted as to produce the pulp at one operation. This construction of the specification was, in effect, holding the invention to be substantially the same as that in the Watt & Burgess re-issue, No. 1449, already considered.

But in *Buchanan v. Howland*, 2 Fish., 341, when the patent was presented for construction in the Northern District of New York, the principle of the discovery was held to be that the known effects of a solution of pure caustic soda, which had been previously used for boiling straw and other fibrous materials of a similar character and texture, in open vessels, in which the heat could be raised only to 212° Fahrenheit, might, by the use of a much higher degree of heat, not less than 310°, be advantageously and greatly increased, while at the same time the reduction of the materials to paper pulp would be more economical, inasmuch as it dispensed with the large quantities of alkali which had been previously employed. This resembles the construction adopted in the court below, though not exactly the same. And such, we think, is the true construction of the specification, and the process described is, we think, an attempted embodiment of this principle. Undoubtedly, the patentee in framing his process made use of known agents. The use of caustic alkali in reducing vegetable substances to paper pulp was no novelty. Neither was boiling under pressure. But a process combining those things with a certain specified arrangement of the strength and quality of the alkaline solution, and a defined regulation of the heat and pressure, may well have been patentable if it had no other novel result than the production of paper pulp more economically. In the specification the improvement claimed is declared to consist "In subjecting straw or other fibrous materials to a pressure of at least seventy pounds on the square inch when boiling such fibrous matters in a solution of caustic alkali." Then follows a description of the mode in which the improvement is effected, in which not only is the minimum of pressure or heat described, but the strength of caustic alkali used is approximately defined. The heat is specified by stating it as equivalent to at least seventy pounds on the square inch, internal pressure, on the boiler, and the strength of the alkali used is described as from two to three degrees of Baumé, or of a specific gravity of from 1.018 to 1.020. These are to be used together in a boiler where a steam-gauge will render it possible to ascertain when the pressure has attained the required degree. A certain strength of alkaline solution, and a degree of heat, indicated by a minimum pressure, are essential elements in the process. The precise proportion of alkali used is not specified, but it is described as about sixteen per cent., that is, sixteen pounds to one hundred of the fibrous substance under process.

The heat is described as that which is equivalent to at least seventy pounds internal pressure on the boiler, or, as the patentee says, equivalent to about 810° Fahrenheit. Quite evidently by using the phrase "internal pressure," the patentee intended artificial pressure alone, that produced by the application of heat, and the measure of the heat. If so, the pressure, as measured by the steam-gauge, instead of being seventy pounds, is the weight of one atmosphere ($14\frac{7}{16}$) less, or $55\frac{1}{16}$ pounds. This was the opinion of the court below, and in that opinion we concur. That the patentee so understood it, is manifest from the fact that he defined seventy pounds internal pressure on the boiler as being equal to about 810° of Fahrenheit. It is much more than equal to that temperature if the pressure is marked by the steam-gauge, unless the weight of the atmosphere be deducted. But if from it be deducted the weight of one atmosphere, the remainder ($55\frac{1}{16}$) approximately corresponds with the temperature named. Sixty pounds pressure exceeds 810° Fahrenheit, even with distilled water, and still more with an alkaline solution. It is, then, altogether probable the French tables of steam pressures, recognized throughout the scientific world, were in the patentee's mind. They start from a vacuum at zero, and make ordinary atmospheric pressure $14\frac{7}{16}$ pounds; whereas, safety valves and manometer gauges in this country are always graduated so as to express the pressure in pounds, exclusive of that of the atmosphere. Mellier was a Frenchman and probably familiar with the French tables.

Understanding the terms used in the specification thus, the elements of the process claimed are, 1, the use of a solution of pure caustic soda (sodium and oxygen), from two to three degrees Baumé strong; and, 2, boiling the materials to which the process is applied in the solution raised to a temperature of not less than 810° Fahrenheit, which, of course, implies the use of a close boiler. The preparation of the materials for the process is no part of it, nor is the subsequent washing and bleaching.

The claim, it is true, in referring to the material to be treated, mentions only straw, but the object of the claim was to secure a monopoly of the process, not to enumerate the materials to which it might be applied. They had already been described in the specification, and there was no necessity for mentioning any of them in the claim. It is true the patent cannot be extended beyond the claim. That bounds the patentee's right. But the claim in this case covers the whole process invented, and the complainants seek no enlargement of the process. Certainly, the claim of the process ought not to be regarded as excluding all other substances than the one mentioned. As already noticed, the specification avows the object of the invention to be a process for treating straw and other vegetable fibrous materials requiring like treatment, preparatory to the use of such fibers in the manufacture of paper. The subject to be treated is fibrous materials of a vegetable nature. And it may well be doubted, in view of this general declaration of the object, whether there is anything that limits the scope of the invention to a process of treating straw and other like materials. The language of the patent is not "straw and other like vegetable ma-

terials." The specification speaks of "straw or such other fibrous matters," of "straw or fibrous matters," of "straw or fibrous substance," "straw or other fibrous material," and it uses other similar forms of expression; but all of them clearly referring to fibrous materials requiring treatment like that required by straw for the production of paper-pulp. It would, therefore, in our opinion, be too narrow a construction of the patent to hold that it is for a process applicable only to straw or other similar vegetable substances, and not applicable to vegetable substances generally requiring like treatment for the uses mentioned.

It remains only to inquire whether the defendants have infringed upon the complainants' rights as thus defined, for no sufficient reason has been given to justify our holding the patent void. This part of the case presents real difficulty. If there has been any infringement it was very slight. Admitting that bamboo, which is the subject principally used by the defendants (though there is some evidence that straw was also used), is one of the vegetable fibrous materials to which the complainants have an exclusive right to apply their process, does the evidence show that the process has been applied? Certainly it has not, unless, in boiling bamboo or straw, the minimum degree of heat and pressure specified in the patent has been employed by the defendants in their treatment of vegetable substances. The evidence upon this subject is, that while using an alkaline solution of less than 3½ degrees Baumé the defendants have sometimes used an external pressure, as measured by the gauge, of from forty to sixty pounds, the latter being equivalent to an internal pressure of nearly seventy-five pounds, or a temperature above 810 degrees. This may have been, and it probably was, only occasionally, but it was, nevertheless, an invasion of the monopoly. In regard to the strength of the solution of caustic alkali employed, there is evidence that the general strength was from two and a half to three degrees Baumé.

Upon the whole, therefore, we have come to the same conclusions as those reached by the court below.

The decree of the Circuit Court is affirmed, and each party is ordered to pay their own costs in this court.

Cited—98 U. S., 129; 103 U. S., 791; 111 U. S., 103; 16 Blatchf., 160; 19 Blatchf., 208.

A. H. SIEWARD ET AL., *Appls.*,
v.

THE STEAMSHIP TEUTONIA, ETC.,
JOACHIM MEYER, Master, etc.

(See S. C., "*The Teutonia*," 23 Wall., 77-85.)

Collision, avoidance of—both vessels in fault.

1. Precautions to avoid a collision between ves-

NOTE.—*Collision; measure of damages for.* See note to *Smith v. Condry*, 42 U. S. (1 How.), 28.

Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 51 U. S. (10 How.), 157.

Rules for avoiding collision; steamer meeting steamer. See note to *Williamson v. Barrett*, 54 U. S. (13 How.), 101.

self must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defense to allege and prove that nothing could be done at the moment to prevent the disaster.

2. Where two steamers were both in fault, in that they continued to advance under headway in a dark night, when those in charge of them knew that there was imminent danger that they would collide, the damages should be divided between them.

[No. 38.]

Argued Oct. 28, 1874. Decided Nov. 16, 1874.

A PPEAL from the Circuit Court of the United States for the District of Louisiana.

The libel in this case was filed in the District Court of the United States for the District of Louisiana by the appellants, to recover for the loss of their steamer, *The A. G. Brown*, resulting from a collision with *The Teutonia*. A decree having been there entered in their favor, but reversed upon appeal by the Circuit Court, they took an appeal to this court.

The case is further stated in the opinion.

Messrs. T. J. Durant and C. W. Hornor, for appellants.

Mr. P. Phillips, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Ships and vessels employed in commerce and navigation are held liable for injuries occasioned to other vessels by collision, on account of the complicity, direct or indirect, of their owners, or on account of the negligence or want of care or skill of those intrusted with their navigation.

Persons engaged in the business of navigation are bound to provide vessels suitable for the purpose, and as the owners appoint the master and employ the crew, they are also responsible that such *employés* possess and exercise due care and skill in the performance of their duty.

Whenever, therefore, a collision ensues from the unfitness of the colliding vessel for the voyage, or from the negligence or want of care or skill of those intrusted with her navigation, the fault is imputed to the owners, and the vessel occasioning the injury is just as much liable for the consequences as if the owners themselves had committed the fault which caused the disaster.

Damages are claimed of the steamship *Teutonia* by the owners of the river steamer *A. G. Brown*, for injuries which the latter received and which it is alleged were occasioned by a collision between the injured steamer and the steamship, on the 30th of December, 1868, on the Mississippi River, about forty-five miles below New Orleans, whereby the steamer of the libelants was sunk and, with her cargo, became a total loss.

Both vessels were engaged in lawful commerce, the steamer of the libelants being bound down the river on a trip from the Port of New Orleans to the southwest pass; and the steamship, which was a large ocean steamer, being bound up the river on a voyage from Hamburg to New Orleans.

Employed as the river steamer was in the coasting trade between the before-mentioned ports, she of course touched at intermediate landings to discharge consignments and receive additional cargo on board, and it appears that shortly prior to the collision the said steamer

having just left the landing at Woodland, and rounded to for the purpose of proceeding on her trip, blew three long whistles as a general signal to all approaching vessels that a steamer was bound down the river. Two whistles were immediately heard in reply from a steamer lower down the river, which signified that she would go to the left bank. Whereupon the steamer of the libelants immediately answered that signal and blew two whistles to signify their intention to take the eastern side of the river. Before the signal from the steamship was heard, the steamer of the libelants had passed two thirds of the way across to the left bank and taken her course down the river. Consequently, they again blew two whistles to reiterate their intention to pass down the river on that side. Responsive to that, the steamship blew one whistle to signify that she was bound to the starboard shore.

Support to these facts is derived from the pleadings and evidence on both sides, to such an extent that they may be said to be without dispute. More difficulty attends the ascertainment of what followed, as the pleadings and evidence of the parties are conflicting. By the libelants it is alleged that they again blew two whistles in response to the one whistle of the steamship, but the claimants allege that no answer was returned to that signal which they gave, and that they then blew three attention whistles, to which also no answer was given by the steamer bound down the river. Other signals were also given by the steamship, as the answer alleges, to the effect that she again blew one long whistle and repeated it two or three times without receiving any answer, which proved to a demonstration that nothing in the way of precaution was effected by the signals beyond the fact that each vessel was apprised of the approach of the other from an opposite direction. Instead of that, the libelants allege that those in charge of their steamer responded to the one whistle of the steamship by a signal of two whistles, she being then close to the eastern shore of the river; that the steamship then again blew two whistles and that the steamer of the libelants answered back by one whistle and immediately stopped her engine, which affords additional support to the conclusion that the approaching steamers were respectively ignorant of each other's intention as to the course they would pursue. Absolute proof of that theory is found in the answer of the claimant, which alleges, in terms, that nothing was done by the officers and crew of the other steamer which could enable those in charge of the steamship to ascertain or determine what course the river steamer intended to pursue, and the pleadings and proofs satisfy the court that those in charge of the river steamer were equally in doubt and uncertainty as to what were the intentions of the steamship.

All agree that both steamers were in a pretty dense fog just prior to the collision and, inasmuch as they had failed to come to an understanding from the signals given as to what precautions would be necessary to avoid a collision, it was manifest rashness to advance until they could in some way accomplish that object, which is virtually admitted by both parties, as each alleges that they stopped their engines. But it is not possible to credit such statements, as it is

clear that if such orders had been given by both parties, and seasonably and effectually executed, the collision would have been avoided. Both cannot be true, and the circumstances disclosed in the testimony satisfy the court that both steamers were under headway when the collision occurred.

Process was issued and served, and the claimants appeared and filed an answer. They deny all the principal allegations of the libel, and set up as a defense that the collision was occasioned by the fault of those intrusted with the navigation of the steamer bound down the river. Hearing was had in the district court, and the district judge being of the opinion that the allegations of the libel were true, entered a decree that the libelants do recover the sum of \$9,000, with costs and interest at the rate of five per cent. from the date therein mentioned until paid.

Dissatisfied with the decree, the claimants immediately appealed to the circuit court, where the parties were again heard upon the same evidence, and the circuit court reversed the decree of the district court and entered a decree dismissing the libel. Whereupon the appellants appealed to this court and assigned for error: 1. That the circuit court erred in reversing the decree of the district court, and in dismissing the libel. 2. That the circuit court erred in decreeing that the steamer of the libelants was in fault. 3. That the circuit court erred in not decreeing that the collision was occasioned by the fault of the steamship.

Neither party objects to the fitness of the other steamer, nor does it appear that there is any reason to doubt that both were well manned and equipped, and the proofs show that they had competent lookouts and sufficient signal lights properly displayed. Beyond doubt it was a dark night and foggy weather, and it is proved that the collision occurred between eleven and twelve o'clock at night. When the first signal was given by the steamer of the libelants, it is certain that both steamers were on the west side of the river, but there is much conflict both in the pleadings and evidence as to what occurred just prior to the collision. Besides stopping the engines, the libelants allege that the master in charge of their steamer ordered the pilot in charge to back the steamer, and seeing that the steamship was crossing the river and approaching the steamer that he halloed to those on the deck of the approaching steamer, that she would run into their steamer; that those in charge of the steamship paid no attention to this warning, but that the steamship came on with a full head of steam, striking the river steamer on the starboard side, making a large hole in her hull and causing her to sink.

Opposed to that are the allegations of the answer that the pilot of the steamship, when he discovered the approach of the steamer of the libelants, ordered the helm of the steamship to be put hard a-port, and the allegation is that the order was immediately executed; that the approaching steamer, nevertheless, kept on her course, and ran with great force and violence foul of the steamship, striking her on the port side, about one hundred and fifteen feet from the stern.

Such contradictory allegations cannot be reconciled, nor is there anything in the testimony to afford much aid in that direction.

Great reliance to support the theory that the steamship struck the steamer upon the starboard side is placed by the libelants upon the testimony of a witness employed by them to examine the wrecked steamer some fourteen months after the collision, whose statements are that he is an experienced diver, and that he examined the injured steamer where she lies about thirty-five feet under water; that he found a hole in her starboard side, three feet and two inches in length and four feet in depth, twenty-five feet aft the stem, and that the hole went clear through the side of the vessel into the hull, and that the planks were started off on the opposite or port side. But the argument for the appellees is that such a theory cannot be supported, as the steamer of the libelants was bound down the river, and it must be admitted that the argument is entitled to weight. Still it is not difficult to see that it may be true if the residue of the libelant's theory is well founded, that the steamship actually attempted to pass up the river between the steamer of the libelants and the eastern shore of the river, as the testimony of the libelants tends strongly to prove.

Inconsistencies, however, such as these, cannot be reconciled with any satisfactory degree of certainty, nor is it necessary to make any such attempt in the case before the court, since, as already said, it is clear, in the judgment of the court, that both vessels were under considerable headway when the collision occurred. Those in charge of each of them knew that the other was approaching from the opposite direction, and that their efforts to come to an understanding as to the respective courses they should pursue had been unsuccessful; and they also knew that the night was dark and foggy to such an extent as to render navigation peculiarly dangerous, confirmation of which is found in the pleadings, as they allege on the one side, and the other that they stopped their engines; but the evidence fully satisfies the court that no such precautions were seasonably taken by either steamer. On the contrary, the evidence satisfies the court that both continued under headway until the two vessels came together, and if so it is unimportant whether the steamship struck the steamer on the starboard or port side, as it is clear that both steamers were in fault.

Attempt is not made to set up the defense of inevitable accident, nor could it have been successful if it had been set up, as such a defense can only be maintained in a case where neither vessel is in fault. Inevitable accident in the case of a collision is where both parties have endeavored by all means in their power, with due care and a proper display of nautical skill, to prevent its occurrence, or it may result from the darkness of the night if it clearly appears that both parties were without fault from the time the necessity for precaution began to the moment when every opportunity to avoid the danger ceased.

Precautions must be seasonable in order to be effectual, and if they are not so, and a collision ensues in consequence of the delay, it is no defense to allege and prove that nothing could be done at the moment to prevent the disaster, or to allege and prove that the necessity for precautionary measures was not perceived until it was too late to render them availing. Inability to avoid a collision usually exists at the moment

it occurs, but it is generally an easy matter, as in this case, to trace the cause to some antecedent omission of duty on the part of one or both of the colliding vessels. Plainly both were at fault in this case in that they continued to advance in a dark night, when those in charge of them knew that there was imminent danger that they would collide. They allege that they stopped their engines, but the court is satisfied that nothing of the kind was seasonably done, as the fact is fully proved that they were both under headway when the collision occurred. Both vessels having been in fault, the rule is that the damages should be divided between the offending vessels.

Decree reversed, with costs in this court, and the cause is remanded, with directions to divide the damages found in the District Court, together with the costs in both of the subordinate courts.

HENRY A. SMYTHE, Collector of the PORT
OF NEW YORK, *Plff. in Err.*,

v.

HENRY C. FISKE ET AL.,

(See S. C., 23 Wall., 374-383.)

*Construction of revenue laws—of statutes—duty
on neckties—construction of department.*

1. Revenue laws are to be construed liberally to carry out the purposes of their enactment. Their penal provisions are not penal in the sense that requires a rigidly strict construction.

2. Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction. The pre-existing law, and the reason and purpose of the new enactment, are also considerations of great weight.

3. Silk neckties are within the last clause of the 8th section of the Act of July 30, 1864, and subject to a duty of 50 per cent. *ad valorem*.

4. The construction of this statute, given to it in its practical administration by the Treasury Department, although not controlling, is not without weight, and is entitled to respectful consideration.

[No. 899.]

Submitted Oct. 23, 1874. Decided Nov. 16, 1874.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

Suit was brought in the court below by the defendants in error, to recover back an alleged excess of import duty paid by them on silk neckties. Judgment having been given in their favor, the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. Geo. H. Williams, Atty-Gen., and S. F. Phillips, Solicitor-Gen., for plaintiff in error:

The claim of the plaintiffs below was that the duty upon neckties was provided for by section 22 of the Act of 1861, and section 18 of the Act of 1862, the joint effect of which is, to impose a duty of thirty-five per cent. upon all articles worn by men, women and children, of whatever material composed, made up or made wholly or in part by hand, not otherwise provided for.

12 Stat., 196, 556.

The existence of the above sections may be laid out of view, as their operation is merely residuary. As in wills, so here, the meaning of the other parts of the instrument is to be ascer-

tained before the extent of a residue can be determined.

The word "silk," when used in the Act as a substantive, unless where qualified by its context, refers to raw silk (see, also, in the same connection, cotton and flax) and, therefore, the phrase, "manufactures of silk," refers in such Act presumptively to silk thread or silk goods and, therefore, that the sections in which it occurs cannot be cited, as otherwise providing for articles of silk "made up," etc., so as to effect the extent of the above residuary provision. We, therefore, shall not contend that neckties are included in the provision. "On all manufactures of which silk is the component material of chief value, not otherwise provided for, 50 per cent."

In view of the evidence on the subject, we suppose that we are concluded from contending that the necktie is an article of ready-made clothing.

Law v. Cross, 1 Black, 533 (66 U. S., XVII., 185); *U. S. v. Jackalow*, 1 Black, 484 (66 U. S., XVII., 225); *Bischoff v. Wethered*, 9 Wall., 812 (76 U. S., XIX., 829).

The provision in the Act of 1842, ch. 270, sec. 20, is that "If any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied, collected and paid on such non-enumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty."

Enumeration may be by classes as well as by articles; but observe, as material, that the enumeration above referred to is, upon its face, of the latter kind only and, therefore, that it is not admissible to regard the above provision of the Acts of 1861 and 1862, as an enumeration of the articles described therein, within the meaning of the above section of the Act of 1842; for, although the class to which these articles belong may be said to be one enumerated in the sections of the Acts of 1861 and 1862, along with other classes, and also some articles, yet the articles of which it is composed are not enumerated; and the Act of 1842 refers to enumerated articles. Upon the contrary, the clause in section 8 of the Act of 1864, is an enumeration of some thirty articles, all of the same material, of which these neckties are composed, many of them articles worn by men, as they are, and some of them, also, articles made up, as they are, or even made wholly or in part by hand, as they are.

We, therefore, submit that the importation of silk neckties in question is governed by the provisions of the Acts of 1864 and 1842.

Mr. Edward Hartley, for defendants in error:

Silk neckties are not manufactures of silk, etc., not otherwise provided for, because they are provided for in the Acts of 1861 and 1862, as "articles worn by men, women or children, and as 'wearing apparel.'" Both terms include them, being used in their ordinary signification, and not as terms of trade. This question was settled in *Maillard v. Lawrence*, 1 Blatchf., 504; affirmed, 16 How., 251.

If "wearing apparel" be the larger term, does the lesser term, "ready-made clothing of silk," cover silk neckties?

In *Elliott v. Swartwout*, 10 Pet., 187, an ac-

tion to recover excess of duties paid on worsted and cotton suspenders, where duty was levied under a clause imposing fifty per cent. *ad valorem* on manufactures of wool and ready-made clothing, the court ignored the words "ready-made clothing," turning the case on the distinction between wool and worsted.

In *Hall v. Hoyt*, reported in 2 Hunt's Merchants' Magazine, 334, an action to recover an excess of duty paid on knit shirts and drawers, the court charged the jury that "If the goods were hosiery in commerce, they were not ready-made clothing."

In *Dorr v. Hoyt*, 2 Hunt's Merchants' Mag., 292, it was held (counsel consenting), that worsted cravats were not ready-made clothing, but hosiery.

A cravat and necktie are as nearly alike as two different articles can be, and both are wearing apparel and an article worn, etc.

The decisions all appear to be that the term "ready-made clothing" is a trade term, and will not cover hats, caps, hosiery, articles of underwear, ties, cravats, etc., all of which are wearing apparel, and articles worn by men, women or children.

Therefore, the court very properly instructed the jury that if ties were not ready-made clothing and not scarfs, to find for plaintiffs; and their verdict is conclusive on this question.

Neckties of silk are not scarfs, and by their verdict the jury so found.

They are not liable to duty as scarfs, from similitude under section 20, Act of Aug. 30, 1842, 5 Stat. at L., 565, because ties are enumerated in the terms "wearing apparel," and "articles worn by men, women and children."

A non-enumerated article is one not embraced under a description contained in an enumeration of articles. *U. S. v. U. S. Telegraph Co.*, 2 Ben., 362; also reported in 7 Int. Rev. Rec., 141, and cases there cited.

The case of *Cohen v. Phelps*, 19 Int. Rev. Rec., 67, which admits the principle in the above cases, practically conflicts with them, because it overlooks the non-enumerated articles of the present tariff. Sec. 24, Act. Mar. 2, 1861, 12 Stat. at L., 196.

In *Stuart v. Maxwell*, 16 How., 158, on which *Cohen v. Phelps* claims to be based, the enumerated articles with which manufacturers of linen and cotton, not provided for by law, were classed for duty, were "manufactures wholly composed of cotton, not otherwise provided for."

As, by the text of the Act of 1842, the non-enumerated article must bear similitude to an enumerated article, the court, in *Stuart v. Maxwell*, must have held that manufactures wholly composed of cotton not otherwise provided for, were enumerated articles; and as this is just the same kind of term as "manufactures of iron not otherwise provided for," in the Act of 1864, the latter is an enumeration also, and the decision in *Cohens v. Phelps* was wrong.

The case of *Cohens v. Phelps* stands alone, while the conclusions reached by Judge Blatchford in *The U. S. v. U. S. Telegraph Co.*, 2 Ben., 362, and by the court below in this case, have uniformly been followed and are admitted, even by the decision in *Cohens v. Phelps*, to present the true state of the law, the learned

judge therein attempting to distinguish between those cases and his own.

The true rule is well settled by Judge Nelson in *Lottimer v. Lawrence*, 1 Blatchf., 614, as follows: "The goods then coming within the list of articles enumerated in that schedule, the case is not one that can be aided by the 20th section of the Act of 1842; because that section applies only in cases where the article in question has not been otherwise provided for. If it has been specially provided for, that excludes any constructive designation by operation of the 20th section."

It is to be observed, also, that it never occurred to court or counsel in *Maillard v. Lawrence*, 16 How., 251, that the words "wearing apparel," or "articles worn," etc., were not an enumeration, although the similitude section was then in force.

As neckties, then, are neither scarfs nor ready-made clothing, as found by the jury, and are provided for under the enumeration of articles worn, etc., and wearing apparel, in the Acts of 1861 and 1862, the judgment below should be affirmed.

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

The question presented for solution is the amount of import duty chargeable upon silk neckties. The subject must be examined in the light afforded by a careful analysis of the several Acts of Congress, to which our attention has been called by the counsel of the parties. The provisions referred to are as follows:

Act of August 30, 1842, 5 Stat. at L., 565, sec. 20. There shall be paid on every non-enumerated article which bears a similitude, either in material, quality, texture or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is charged on the article which it most resembles in the particulars mentioned. If any non-enumerated article resembles equally two or more enumerated articles on which different rates of duty are chargeable, there shall be paid on such article the rate of duty chargeable on the article it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rate at which any of its component parts may be chargeable.

The Act of July 30, 1846, 9 Stat. at L., 42, sec. 1, imposes a duty of thirty per cent. *ad valorem* upon the articles of merchandise specified in schedule c (p. 44). This schedule embraces among other things "Articles worn by men, women or children, of whatever materials composed, made up or made wholly or in part by hand, not otherwise provided for."

The Act of May 2, 1861, 12 Stat. at L., 178, sec. 22, p. 191, imposes a duty of thirty per cent. upon the articles therein enumerated. Among them are articles worn by men, etc., as specified in the Act of 1846, and described in the same terms. Section 16, page 186, declares that upon certain specified articles of silk, neckties not being among them, and upon "All other manufactures of silk, or of which silk

shall be the component material of chief value a duty of thirty per cent. *ad valorem* shall be paid.

The Act of July 14, 1863, 12 Stat. at L., 543, sec. 12, imposes an additional duty of five per cent. upon articles worn by men, etc., repeating the language of the Act of 1846 in describing them.

The Act of July 30, 1864, 13 Stat. at L., 303, sec. 3, p. 210, imposes a duty of sixty per cent. "On all dress and piece silks, ribbons and silk velvets, or velvets of which silk is the component material of chief value," and the same duty "On silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, lace, shirts, drawers, bonnets, hats, caps, turbans, chemises, hose, mitts, aprons, stockings, gloves, suspenders, watch chains, webbing, braids, fringes, galloons, tassels, cords and trimmings." Then follows this clause, which concludes the section: "On all manufactures of silk or of which silk is the component material of chief value, not otherwise provided for, fifty per cent. *ad valorem*."

This Act is entitled "An Act to Increase Duties on Imports and for Other Purposes."

A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. *People v. Jas. Co.*, 15 Johns., 390; *Atkins v. Fiber Disintegrating Co.*, 18 Wall., 301 [85 U. S., XXI., 844]. *Bac. Abr.*, tit. Stat., 1, 3, 3, 5. The intention of the law-maker is the law.

Revenue laws are to be construed liberally to carry out the purposes of their enactment. Their penal provisions are not penal in the sense that requires a rigidly strict construction. *Taylor v. U. S.*, 3 How., 197; *Chiquet's Champagne*, 3 Wall., 115 [70 U. S., XVIII., 116]. Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction. *Maker v. Blight*, 3 Cranch, 396, *C. S. v. Palmer*, 3 Wheat., 631. The pre-existing law, and the reason and purpose of the new enactment are also considerations of great weight. *Hayden's case*, 3 Rep. (Co.), 7 b; 1 Bl. Com., 61; *Sedg. Stat. and Const. L.*, 1st ed., 237.

Upon the trial of this case the learned circuit judge held that silk neckties were within the clause last quoted unless the words "not otherwise provided for" excluded them from it, and brought them within the Acts of 1861 and 1863. Such he instructed the jury was the effect of the negation.

In his view, those words referred not to the

the phrase "not otherwise provided for," was interposed, and meant to apply, not to preceding Acts which may not have been present to the mind of the draftsman, and to which there was no necessity to recur, but to the preceding enumeration in the same section, which it supplemented.

The section, thus construing this clause, covers the whole subject of silk, in all its variety of forms. It was complete in itself. There was no need to refer generally or specially to any prior Act. If there was conflict, the prior legislation yielded, necessarily, *ipso facto* to the later.

All the manufactured articles enumerated in this section of the Act of 1864 were subjected to a duty of sixty per cent.

The duty imposed by the Acts of 1861 and 1863 is thirty-five per cent.

Why leave the non-enumerated articles, covered by the Act of 1864, subject only to this lower rate of duty? Why this distinction? Such a result would, we think, be a solecism, and contrary to the spirit and purpose of the Act. It cannot reasonably be supposed that such was the intent of the clause in question.

This view of the subject fixes the duty upon silk neckties at fifty per cent. *ad valorem*.

If we had not come to this conclusion, we should hold that the case is controlled by the 20th section of the Act of 1842, 5 Stat. at L., 565. The provisions of that section first appeared in the 2d section of the Act of Sep. 11, 1841, 5 Stat. at L., 463. They were re-enacted in the Act of 1842, and were a permanent part of the customs duty system of the country. They were unaffected by any of the later tariff Acts, and were in force when the duty in question was collected. *Stuart v. Mazzeoli*, 15 How., 150. Under that section, as applied to the Act of 1864, the rate of duty would be sixty per cent. instead of fifty. But, as we hold that the clause we have considered, of the 8th section of the Act of 1864, applies, it excludes the operation of the earlier statute.

The construction we have indicated, of these statutes, is that given to them in their practical administration by the Treasury Department ever since their enactment. This, though not controlling, is not without weight, and is entitled to respectful consideration. *Edwards v. Darby*, 12 Wheat., 206; *U. S. v. Dickson*, 15 Pet., 141. *U. S. v. Gilmors*, 9 Wall., 330 [75 U. S., XIX., 330].

Our views as to the amount of duty chargeable on the neckties in question are corroborated by the following further considerations:

In the Revised Code of the United States, of June 23, 1874 (tit. 33, *Treas. Compilation*, pp. 232, 245), the similitude clause of the Act of 1842, and the 8th section of the Act of 1864, are reproduced without change. The provision as to "articles worn by men," etc., is also reproduced, but as follows:

"Articles worn by men, women or children, of whatever material composed, except silk and linen, made up or made wholly or in part by hand, not otherwise provided for, thirty-five per cent. *ad valorem*." *Treas. Compilation*, sched. M, p. 351.

The exceptions mentioned were here for the first time expressly interposed, but it was a legislative declaration that such was the state

of the law on the first of December, 1873, without the exceptions; and it is necessarily a construction of the last clause of the 8th section of the Act of 1864, in accordance with that which we have given to it. It was the declared purpose of Congress to collate all the statutes as they were at that date, and not to make any change in their provisions. Obviously these exceptions were intended to remove doubts and misconstruction, which were known to have prevailed to some extent.

The question whether these neckties were either "scarfs" or "ready-made clothing," was submitted to the jury, and they must have found the negative as to both. We have proceeded upon the assumption that this finding was correct. We have no power to review it in this proceeding.

The judgment of the Circuit Court is reversed and the case is remanded to that court, with directions to award a venire de novo, and proceed in conformity to this opinion.

Cited—95 U. S., 147; 96 U. S., 113, 115; 102 U. S., 212; 105 U. S., 695; 107 U. S., 406, 622; 110 U. S., 485; 9 Ben., 302; 13 Blatchf., 196; 14 Blatchf., 58; 2 Low., 543.

EDSON T. STICKNEY, Assignee in Bankruptcy of P. J. VANDERVEER, *Appl.*,

v.
HARRISON WILT.

(See S. C., 23 Wall., 150-164.)

Suits under Bankrupt Law—appeal of—jurisdiction — pleadings — supervisory proceedings—form of judgment in appellate court.

1. A suit in equity, commenced under the 3d clause of the 2d section of the Bankrupt Act, can only be removed into the Circuit Court by appeal, as provided in the 8th section of that Act.

2. An appeal will not lie from the Circuit Court to this court, from the decree of the Circuit Court rendered in a petition of review, filed under the supervisory jurisdiction conferred upon the Circuit Courts by the 1st clause of the 2d section of the said Bankrupt Act.

3. The District Courts and Circuit Courts have concurrent jurisdiction of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest in the bankrupt's property, or by such person against such assignee, as to any property transferred to or vested in such assignee, by virtue of the 14th section of the Act providing for such transfers.

4. The first pleading in the District Court may be, in form, a petition where it contains every requisite of a good bill in equity. It is no objection that it contains no prayer for process, where the parties respondent appeared.

5. Cases arising under the 3d clause of the 2d section, where the debt or damages claimed amount to more than \$500, may be appealed from the District Court to the Circuit Court for the same district. Such cases do not fall within the supervisory jurisdiction conferred upon the Circuit Courts by the said 1st clause of the 2d section.

6. Final judgments and decrees in such cases rendered in the Circuit Court, if the matter in dispute exceed the sum or value of \$2,000, may be removed into this court for re-examination.

7. Where the court below has no jurisdiction of the case in any form of proceeding, this court will, if the judgment or decree is for the defendant or respondent, direct the cause to be dismissed.

8. But if the judgment or decree is for the plaintiff or petitioner, this court will reverse the judgment or decree, and remand the cause with directions to dismiss the suit.

[No. 37.]

Submitted Oct. 27, 1874. Decided Nov. 23, 1874.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

This case arose upon a petition filed by the appellant, as bankrupt's assignee in the District Court of the United States for the Northern District of Ohio, for the sale of the bankrupt's lands and preliminary thereto, to free them from a certain lien which the appellee was alleged to claim thereon.

The appellee appeared as respondent. A decree having been entered in favor of the petitioner, the respondent filed a petition on his part in the Circuit Court for a review of said proceedings. The Circuit Court having entered a decree reversing the decision of the District Court, and establishing the validity of the said lien, the assignee of the bankrupt took an appeal to this court.

The case is further stated by the court.

Messrs. A. G. Riddle and W. P. Noble, for appellant:

The Circuit Court was without jurisdiction of the premises. This is the only question in this case.

First. Sections 1 and 2 of the Bankrupt Act seem to contemplate that as between the assignee, creditors and others, questions may arise not falling strictly within the scope of an action at law or a suit in equity. For such cases they provide for a summary proceeding on application to the District Court, and in this class of cases the aggrieved party may have the case reviewed in the Circuit Court, upon bill, petition or other proper process.

That the instances where this review may be had is limited to this class is apparent, for this action can alone be had in cases not otherwise specially provided for; and all actions at law and suits in equity are specially provided for. Sec. 2, as above.

Clearly the subject-matter in this case was one of purely equitable jurisdiction, and if the action of the District Court in the premises had any significance, it was because it exercised its equitable jurisdiction, and its decree remaining unappealed from is conclusive.

This question is clearly within *Smith v. Mason*, 14 Wall., 419 (81 U. S., XX., 748); also, *Morgan v. Thornhill*, 11 Wall., 65 (78 U. S., XX., 60); *Marshall v. Knox*, 16 Wall., 556 (83 U. S., XXI., 484).

Mr. George E. Seney, for appellee:

This case, it will be noticed, was taken to the Circuit Court, upon petition for review, under the 1st clause of section 2 of the Bankrupt Act.

The appellant insists that the Circuit Court could take jurisdiction only by appeal under section 8.

Section 2 of the Bankrupt Act provides that the Circuit Court shall have a general superintendence and jurisdiction of all cases and questions arising under the Act, and except when special provision is otherwise made, may upon bill, petition or other proper process, of any party aggrieved, hear and determine the case as a court of equity.

Section 8 of the Act provides that appeals may be taken from the District to the Circuit Court in all cases in equity.

The argument against the jurisdiction of the Circuit Court, rests upon the assumption that this is a case in equity and, therefore, the proceeding is by bill in chancery.

The record shows the proceeding to be nothing more than an ancillary petition in the ordinary form, for the purpose of obtaining an order for the sale of the bankrupt's estate. The adjustment of the liens is only incidental to the main object of the petition, and preliminary to making the order of sale. The petition is like the petition of an administrator for an order to sell the decedent's lands for the payment of debts. Such a proceeding always involves the power to adjust and determine liens, before ordering a sale. In the adjustment and determination of these liens, frequently important and difficult questions arise, involving legal and equitable principles. Yet such a proceeding is not a case in equity.

The petitioner, the assignee in bankruptcy, as well as the District Court, treated the matter as a summary proceeding and not as a case in equity. No writ of subpoena was asked for, nor did one issue. The petition was filed Sep. 8 and, forthwith, the court made an order that the defendants should answer upon the 29th of the same month. This could not be done in a proceeding in chancery. Nor was objection made by the court or by the parties that the proceeding should be by bill in chancery, and not summarily, upon petition.

The District Court has exclusive original jurisdiction of a proceeding asking for the sale of a bankrupt's estate and the adjustment of the liens upon it, and no jurisdiction can be acquired by the Circuit Court, on appeal.

The jurisdiction of the Circuit Court, in this class of cases, is conferred by that part of section 2 which gives to that court a general superintendence and jurisdiction of all cases and questions arising under the Act, and authorizes it to hear and determine the case, as a court of equity, upon the bill, petition or other process of the party aggrieved.

This construction is held in the case of *Morgan v. Thornhill*, 11 Wall., 65 (78 U. S., XX., 60), where the supervisory jurisdiction of the Circuit Court, under section 2, extends to the decree of the District Court, adjudging the Bank of Louisiana a bankrupt, ordering a surrender of its property and enjoining, perpetually, the State Commissioners from the exercise of their functions, under the laws of the State of Louisiana.

Again; in *Hall v. Allen*, 12 Wall., 458 (79 U. S., XX., 458), the superintending jurisdiction of the Circuit Court, under section 2, is held, in a case of conflicting interests and disputed priorities between the individual and partnership creditors of a bankrupt.

In *Mead v. Thompson*, 15 Wall., 635 (82 U. S., XXI., 242), this court held that when a petition to the Circuit Court to re-examine a decree of the District Court in bankruptcy, prays the court to review and reverse that decree, and to grant such further order and relief as may seem just, the jurisdiction invoked must be regarded as the supervisory jurisdiction, which is allowed to Circuit Courts acting as courts of equity, by section 2 of the Bankrupt Act.

Again; in *Marshall v. Knox*, 16 Wall., 554 (53 U. S., XXI., 483), it is held that under section 2 of the Bankrupt Act, the revisory jurisdiction of the Circuit Court extends to the orders of the District Court, made in proceedings

commenced by the assignee of a bankrupt, to recover property from a sheriff, who held it under legal process.

The Circuit Court of the United States for the District of Louisiana, *In re York & Hoover*, 4 Nat. Bk. Reg., 156, held that the supervisory jurisdiction of the Circuit Court, under section 2, extends to all questions in ascertaining and liquidating liens upon the estate of the bankrupt, and to adjusting the various priorities and conflicting interests of all parties.

A case directly in point was considered by the Circuit Court of the United States for the District of Virginia. An appeal was taken by a lienholder from an order of the District Court directing the assignee to sell the bankrupt's incumbered real estate. The late *Chief Justice Chase*, in dismissing the appeal, held that the jurisdiction of the Circuit Court, in such a case, is supervisory, under section 2, and not appellate under section 8.

In re Alexander, 8 Bk. Reg., 6.

The principle established by these adjudications, gave to the Circuit Court, in the case at bar, jurisdiction, under section 2, to review the order of the District Court, adjusting the liens upon and directing a sale of the bankrupt's estate.

Counsel for appellant suggests that the question of the jurisdiction of the Circuit Court, in this case, is within the rule of *Smith v. Mason*, 14 Wall., 419 (81 U. S., XX., 748).

The court held that, inasmuch as the absolute title to the fund was the subject-matter of the controversy, the case was that of an assignee in bankruptcy, against a person who made an adverse claim to property transferable to or vested in the assignee, under the 8d clause of section 2, of which the Circuit Court had concurrent jurisdiction with the District Court, and that the proceeding in such case must be, as that clause expressly requires, a suit at law or in equity.

The appeal should be dismissed.

First. If the Circuit Court had no jurisdiction, no appeal lies from its judgment.

Second. If the Circuit Court had jurisdiction, under section 2 of the Bankrupt Act, no appeal lies to the Supreme Court.

Morgan v. Thornhill, 11 Wall., 65 (78 U. S., XX., 60); *Hall v. Allen*, 12 Wall., 458 (79 U. S., XX., 458); *Mead v. Thompson*, 15 Wall., 635 (82 U. S., XXI., 242).

Mr. Justice Clifford delivered the opinion of the court:

Circuit Courts have concurrent jurisdiction with the District Courts of the same district, of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest in any property or rights of property of the bankrupt, transferred to or vested in such assignee, or by such person against such assignee, touching any such property or rights of property so transferred to or vested in such assignee as in the former case. 14 Stat. at L., 518.

Appeals in such cases may be taken from the District Courts in all cases in equity, and writs of error may be allowed from the Circuit Courts to the District Courts in all cases at law arising under that provision, where the

debt or damages claimed amount to more than \$500, provided the party claiming such appeal or writ of error shall seasonably comply with the conditions set forth in the 8th section of the Bankrupt Act. 14 Stat. at L., 520.

Cases of the kind may also be removed from the Circuit Court to the Supreme Court, if the matter in dispute shall exceed \$2,000, if the party appealing shall comply with the Acts of Congress regulating such appeals and writs of error from the Supreme Court to the Circuit Courts.

1 Stat. at L., 83; 14 Stat. at L., 521; 2 Stat. at L., 244.

Application was made by the present appellant as such assignee to the District Court of the district where the bankrupt proceedings were pending, to determine whether certain pretended liens upon certain described lands belonging to the estate of the bankrupt were valid and operative, and that he, the assignee, should be directed by the decree of the court to sell the lands and to distribute the proceeds.

Three of the persons made parties respondent appeared, and waived the issuing and service of process and entered their appearance in the suit. Besides those, the appellee here also appeared and filed an answer which is under oath.

Technically, the appellee was not made a party to the application, but the petition alleged that he claimed some lien upon the premises, and the petitioner denied the existence of any such lien. Responsive to that and to the prayer of the petitioner that all questions and rights of each and all of the parties therein named should be determined by the court, the appellee, as such respondent, pleaded to the effect that the bankrupt, on the 3d of August, 1869, executed a promissory note to John Huss or bearer, for the sum of \$4,000, and that he secured the same by a mortgage of the described land; that he, the appellee, on the 4th of September following, became surety for the bankrupt to certain national banks therein named, in several promissory notes, amounting in the aggregate to the sum of \$3,260; and that the bankrupt at the same time delivered to him the said first mentioned note, and the mortgage as collateral security to protect him from his liability as such surety, and that the mortgage was on the same day delivered by him to the recorder and was duly recorded in the proper county; that he has since been compelled to pay two of said notes, amounting to \$2,600, and that he is bound to pay the residue with accruing interest; and he avers that no part of the amount so paid by him has ever been refunded to him by the debtor. Based upon these representations, he prayed that the whole amount for which he became surety may be decreed to be a lien upon said land.

Subsequently, the assignee filed a reply to the answer of the appellee, in which he alleges that the mortgage note and mortgage were made and executed to the mortgagee therein named without his knowledge or consent and the assignee denies that the same were ever delivered to the mortgagee as alleged in the answer, and he avers that he has no knowledge whether the appellee ever became surety for the bankrupt, or whether the mortgage note and

mortgage were ever delivered to him for the purpose represented, or whether he has ever paid anything as such surety, or whether any part of said notes is still outstanding against him; and therefore he, the appellant, denies each and all of said allegations.

Superadded to such denials he also sets up, in avoidance of the pretended lien of the appellee that he, the appellee, well knew at the time of such delivery that the debtor was insolvent and unable to pay his just debts, and that the promissory note and mortgage were delivered to him by the debtor in contemplation of insolvency and bankruptcy, to wit: within four months before the filing of the petition against him, under which he was adjudged a bankrupt; and the appellant, as such assignee, also charges that the appellee had reasonable cause to believe, at the time, that the debtor was insolvent, and that he was acting in contemplation of insolvency, and with a view to evade and defeat the provisions of the Bankrupt Act.

Proofs were taken on both sides, from which it appeared that the debtor, on the 30th of January, 1870, made a general assignment of all his property for the equal benefit of all his creditors, he being largely insolvent; and the proofs also showed that the debtor was subsequently adjudged a bankrupt in the usual course of proceeding, and that the appellant here was duly appointed the assignee of his estate. Enough also appears in the transcript to warrant the statement that the District Court overruled the allegations of the answer filed by the appellee, and entered a decree that the lien claimed by him as such surety was inoperative and invalid, not only for the amount actually paid, but also for the amount for which he, the appellee, as such surety, still remains liable.

Power undoubtedly is vested in the Circuit Court to revise such a decree on appeal, if the appeal is taken and perfected in ten days as provided in the 8th section of the Bankrupt Act, but no appeal was ever claimed by the losing party, nor was any appeal ever allowed by the District Court. Instead of that, the appellee, on the 30th of March, 1871, filed his petition of review in the Circuit Court of the District, requesting that court to exercise the supervisory jurisdiction which is conferred upon the Circuit Courts by the 1st clause of the 2d section of the Bankrupt Act, in which petition he charged that the decree of the District Court, that the lien set up in his answer to the original petition was inoperative and invalid, is erroneous, and he prayed that the finding and decree of the District Court may be reversed, vacated and set aside, and that he, the petitioner for review, may be restored to all his just rights.

Pursuant to the petition of the appellee, the Circuit Court passed an order that the parties respondent, if they elect to answer the petition of review, shall file the same on or before the day named in the order; but no answer was ever filed by the respondents, and the parties having subsequently been heard upon the petition of review, the Circuit Court entered a decree that the decree of the District Court be reversed with costs, and that the lien

claimed by the petitioner in review, as more fully set forth in the record, is a good and valid lien upon the premises.

Pending the petition of review, the assignee, by leave of the court, filed a plea denying the jurisdiction of the Circuit Court to inquire into the matters in controversy in manner and form as set forth in the petition of review; but the Circuit Court, notwithstanding that plea, entered the decree reversing the decree of the District Court, and the assignee took an appeal to this court as if thereto authorized by the Act of Congress allowing appeals in cases of equity and admiralty and maritime jurisdiction. 2 Stat. at L., 244.

Two principal objections are taken to the proceedings, as tending to show that this court has no jurisdiction to hear and determine the case under the powers conferred by the Bankrupt Act:

(1) Because the original pleading in the District Court is a suit in equity, commenced under the 3d clause of the 2d section of the Bankrupt Act, which could only be removed into the Circuit Court by appeal, as provided in the 8th section of that Act.

(2) Because an appeal will not lie from the Circuit Court to this court, from the decree of the Circuit Court rendered in a petition of review, filed under the supervisory jurisdiction conferred upon the Circuit Courts by the 1st clause of the 2d section of the said Bankrupt Act.

1. Concurrent jurisdiction with the Circuit Courts is conferred upon the District Courts of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of such assignee, transferred to or vested in such assignee, by virtue of the 14th section of the Act providing for such transfers.

Rights of property were claimed in these lands by the appellee, and the suit in this case was commenced in the District Court contesting that claim, which is plainly a subject-matter cognizable under that provision; nor is it any argument against that theory that the first pleading in the District Court is, in form, a petition, as suits at law and in equity, in many jurisdictions, are commenced in that form of pleading. Beyond all doubt the petition contains every requisite of a good bill in equity, whether the pleading is tested by the statement of the cause of action, or by the charging part of the bill, or by the prayer for relief; and if it be suggested that it contains no prayer for process, the answer to the objection is a plain one, to wit: that three of the parties respondent appeared and waived the issuing and service of process, and that the appellee voluntarily appeared and filed an answer.

Nor is it any valid objection to that view that the Circuit Court, under the supervisory clause of the 2d section, may, in certain cases, proceed by bill, petition or other proper process, as the power conferred by that clause does not extend to any case or question "otherwise provided for," by any special provision, especially as it is clear that cases arising under the 3d clause of that section, where the debt or damages claimed amount to more than \$500, may

be appealed from the District Court to the Circuit Court for the same district. 14 Stat. at L., 520.

Special provision, therefore, is made for the removal of such a case into the Circuit Court, and inasmuch as the case is made the subject of such special provision, it follows, beyond peradventure, that it does not fall within the supervisory jurisdiction conferred upon the Circuit Courts by the said 1st clause of the 2d section.

2. Much discussion of the second question is unnecessary, as the justices of this court are unanimously of the opinion that the question is settled in the negative by the prior decisions of this court. *Morgan v. Thornhill*, 11 Wall., 72 [78 U. S., XX., 62].

Even a slight examination of that case will be sufficient to convince any inquirer that the question under consideration was directly presented for decision in that case, and it is equally certain, in the judgment of the court, that it was expressly decided without any qualification whatever. Attempts have since been made to induce the court to give its sanction to certain alleged exceptions to the rule, but the court has in every such case refused to countenance any such theory. *Hall v. Allen*, 12 Wall., 452 [79 U. S., XX., 458]; *Smith v. Mason*, 14 Wall., 419 [81 U. S., XX., 748]; *Marshall v. Knox*, 16 Wall., 556 [83 U. S., XXI., 484]; *Knight v. Cheney*, 5 Nat., Bk. Reg., 309; *Ins. Co. v. Comstock*, 16 Wall., 258 [83 U. S., XXI., 493]; *Coit v. Robinson* [ante, 152].

Controversies, in order that they may be cognizable in the Circuit or District Court, under the 3d clause of the 2d section of that Act, must have respect to some property or rights of property of the bankrupt transferable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other, no matter whether they are citizens of the same State or not, as the jurisdiction is conferred by the Bankrupt Act and depends upon the conditions therein prescribed.

Final judgments and decrees in such cases rendered in the Circuit Court, if the matter in dispute exceeds the sum or value of \$2,000, may be removed into the Supreme Court for re-examination, as provided in the 22d section of the Judiciary Act. 1 Stat. at L., 84.

Such judgments and decrees, however, in order that they may be re-examinable in this court, must be final judgments or decrees, rendered in term time, as contradistinguished from mere interlocutory judgments or decrees or orders which may be entered at chambers, or if entered in court are still subject to revision before the final disposition of the cause.

Prior to the passage of the Bankrupt Act, the District Courts possessed no equity jurisdiction whatever, but it is undoubtedly true that those courts do now possess concurrent jurisdiction with the Circuit Courts in the cases specified in the 3d clause of the 2d section of that Act; and that final decrees rendered by those courts in such cases, where the debt or damages claimed amount to more than \$500, may be removed by appeal into the Circuit Court for re-examination. Doubt upon that subject cannot be entertained, and it is equally certain that a final decree rendered in the Circuit Court in such a case, wheth-

er originally brought there or removed there by appeal from the District Court, may be removed by appeal into this court for re-examination, provided the appeal is perfected as required in the Acts of Congress allowing appeals in cases of equity and of admiralty and maritime jurisdiction. 2 Stat. at L., 244; 1 Stat. at L., 84. Nothing of the kind was done in this case, as appears by the record.

Sufficient has already been remarked to show that the proceeding to revise the decree of the District Court was instituted and prosecuted throughout under the 1st clause of the 2d section of the Bankrupt Act, which confers upon the Circuit Courts merely a supervisory power over the proceedings of the District Courts in bankruptcy, and which the Circuit Courts may exercise in term time or vacation, and the provision is that the jurisdiction shall extend to questions, as well as cases, arising under the Bankrupt Act, except where provision is otherwise made. Special provision is otherwise made for appeals in cases like the one before the court, and it necessarily follows that the case is not one falling within the power conferred upon the Circuit Courts by the 1st clause of the 2d section of that Act.

Where both the Circuit Court and this court are without jurisdiction it is in general irregular to make any order or decree in the case, except to dismiss the suit, but that rule does not apply to a case where the Circuit Court renders a judgment or decree in favor of the party instituting the suit; but in such a case the court here will reverse the judgment or decree in the court below, and remand the cause with directions to dismiss the suit.

Unless the practice were as explained, great injustice would be done in all cases where the judgment or decree is in favor of the plaintiff or petitioner, as he would obtain the full benefit of a judgment or decree rendered in his favor by a court which had no jurisdiction to hear and determine the controversy. *U. S. v. Huckabee*, 16 Wall., 435 [83 U. S., XXI., 464].

Want of jurisdiction to hear and determine the merits in such a case does not show that this court may not correct the erroneous judgment or decree of the Circuit Court; but if the Circuit Court is also without jurisdiction, this court cannot direct a new trial or a new hearing, as it may do in a case where the want of jurisdiction in this court is occasioned by a mistrial in the court below, which has led to an erroneous removal of the cause from the Circuit Court into this court, as by appeal instead of a writ of error, or by a writ of error, when it should have been by appeal. *Morris' Cotton*, 8 Wall., 512 [75 U. S., XIX., 482]; *Mail Co. v. Flanders*, 12 Wall., 185 [79 U. S., XX., 250].

Cases wrongly brought up, it may be admitted, should, as a general rule, be dismissed by the appellate tribunal, but a necessary exception exists to that rule where the consequence of a decree of dismissal will be to give full effect to an irregular and erroneous decree of the subordinate court in a case where the decree is entered without jurisdiction, and in violation of any legal or constitutional right. Rules of practice are established to promote the ends of justice, and where it appears that a given rule will have the opposite effect, appellate courts are inclined to regard the case as one of an exceptional char-

acter. Such courts, where there is no defect in bringing up a cause, usually affirm or reverse the judgment or decree of the subordinate court, but cases occasionally arise in which the proceedings in the lower court are so irregular that a mere affirmance or reversal upon the merits would work very great injustice, and in such cases it is competent for the appellate court to reverse the judgment or decree in question and to remand the cause with such directions, if it be practicable, as will do justice to both parties. Instances of the kind are numerous in the decisions of this court, nor is there much difficulty in accomplishing the end in view in a case where the subordinate court has jurisdiction of the subject-matter, and the right to a new appeal or writ of error is not barred by lapse of time. *Barnes v. Williams*, 11 Wheat., 415; *Suydam v. Williamson*, 20 How., 441 [61 U. S., XV., 984]; *Carrington v. Pratt*, 18 How., 63 [59 U. S., XV., 267]; *Prentice v. Zane*, 8 How., 484; *Montgomery v. Anderson*, 21 How., 388 [62 U. S., XVI., 161]; *Mordecai v. Lindsay*, 19 How., 200 [60 U. S., XV., 624].

Difficulties of the kind frequently occur in cases of seizures, as the District Courts have often failed to distinguish between seizures on land and seizures on navigable waters, sometimes trying the latter as a common law action, and sometimes trying the former as an instance cause. Mistakes of the kind have also been made in libels of information filed under the confiscation Acts passed by Congress. Errors of the kind, when they have seasonably come to the knowledge of this court, have uniformly been corrected, as far as it is in the power of this court to afford a remedy. Serious embarrassment often arises in such cases where it appears that the subordinate court is also without jurisdiction, but that difficulty does not prevent this court from assuming jurisdiction, on appeal, for the purpose of reversing the judgment or decree rendered in such subordinate court, in order to vacate the same, when rendered or passed without authority of law.

Where the court below has no jurisdiction of the case in any form of proceeding, the regular course, if the judgment or decree is for the defendant or respondent, is to direct the cause to be dismissed; but if the judgment or decree is for the plaintiff or petitioner, as in this case, the court here will reverse the judgment or decree and remand the cause with proper directions, which in the case supposed must be to dismiss the writ, libel or petition, as the subordinate court cannot properly hear and determine the matter in controversy.

Ins. Co. v. U. S., 6 Wall., 760 [73 U. S., XVIII., 879]; *Armstrong's Foundry*, 6 Wall., 769 [73 U. S., XVIII., 884]; *U. S. v. Hart*, 6 Wall., 772 [73 U. S., XVIII., 914]; *The Caroline*, 7 Cranch, 500; *The Sarah*, 8 Wheat., 394.

Viewed in the light of these suggestions, it is quite clear that the decree of the Circuit Court, rendered under the petition of review, must be reversed and, inasmuch as the Circuit Court has no jurisdiction of the subject-matter in that form of proceeding, and that it is now too late to take an appeal from the District Court to the Circuit Court, the cause must be remanded with directions to dismiss the petition.

Unable to refer the appellee to any legal remedy as matter of right, under the present plead-

ings, it seems to be proper, in the judgment of the whole court, to suggest that it may be that the District Court will grant a review of the decree rendered in that court, if a proper application is presented for that purpose, which would lay the foundation, if it be granted, in case of an adverse decision upon the merits of the case, for a regular appeal to the Circuit Court.

Decree reversed without costs and the cause remanded, with directions to dismiss the petition for want of jurisdiction.

Cited—35 Wall., 228; 22 U. S., 248; 25 U. S., 257, 258; 26 U. S., 266, 271; 14 Bk. Reg., 322; 15 Bk. Reg., 422; 17 Bk. Reg., 24, 421; 5 Wood, 222.

JAMES M. THOMPSON, App't.,

THE STEAMER GREAT REPUBLIC, W. B. DONALDSON ET AL., Claimants.

(See 3 C., "The Great Republic," 25 Wall., 20-35.)

Collision—rules in regard to—vessels pursuing same course—burden of proof—inmaterial fault.

1. It is impossible to measure distances on the water with accuracy, and in times of excitement there is very little reliance to be placed upon the opinion of anyone on this subject.

2. The pilot of a pursuing vessel should not proceed on a mere supposition as to the situation or movements of a vessel in advance.

3. Where two vessels are pursuing the same course, precautions against dangers rest to a greater extent upon the boat in the rear than upon the boat in advance; and this is eminently true of a large and fast steamer following a small and slow boat.

4. Where the pilot of one of the fastest and largest steamers on the Mississippi River, in plain sight of a small coasting vessel engaged in landing freight and passengers at the plantations on both sides of the river, runs her down without using any signals at all, or answering those she gave, or taking any precautions to escape danger until too late, he is guilty of mismanagement.

5. The burden to excuse herself is on the following vessel, she having actually overtaken the forward vessel and run her down.

6. In any case of collision, whenever it appears that one of the vessels has neglected the usual and proper measures of precaution, the burden is on her to show that the collision was not owing to her neglect.

7. Where the advance vessel did not blow her whistle as soon as she ought, this omission was a

fault; but this fault bears so little proportion to the many faults of the pursuing vessel, that, under the circumstances of this case, the former should not share the consequences of the collision with the latter vessel.

[No. 78.]

Argued Nov. 24, 1874. Decided Dec. 7, 1874.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The libel in this cause was filed in the District Court of the United States for the District of Louisiana, by the appellant, as owner of the steamboat Cleona, to recover for damages sustained by that boat in a collision. Judgment was rendered dismissing the libel, for reasons orally assigned. A new trial was granted and a decree again entered dismissing the libel. This decree was affirmed by the circuit court.

The facts are stated in the opinion.

Movers. T. H. N. McPherson, Bentinck Egan, J. A. Grow, W. T. Otto and E. Lovell, for appellant.

By Act of Congress, 1864, p. 61, art. 16, every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship, when in a fog, go at a moderate speed.

By article 17 of the same Act, every vessel overtaking any other vessel shall keep out of its way.

In the case at bar, the evidence is positive that The Republic did not comply with section 16 of the Act above referred to, although there was a risk of a collision. In fact, it was predicted by all the passengers on the boat long before it occurred and even by one of the pilots of The Republic in his statement to Mr. Litterell, a passenger and pilot by profession. His words were: "If Mr. Kribben does not stop The Republic he will be into The Cleona." He did not stop her, and the prediction was verified to the letter. Everyone appeared to see the consequences before the collision occurred, except the reckless and probably drunken pilot at the wheel of The Great Republic. Nor was there any effort made to keep out of the way of the vessel to be passed, The Cleona, as prescribed by article 17 of the Act above referred to, but the reverse. The evidence which we have quoted above shows that

NOTE.—Collision; measure of damages for. See note to Smith v. Condry, 43 U. S. (1 How.), 22.

Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to St. John v. Palmes, 51 U. S. (10 How.), 537.

Rules for avoiding collision; steamer meeting steam-

13 Wood, 24; Hammond v. Blake, 10 B. & C., 434; Gerrish v. Johnson, 1 Jones, N. C., 225; Hunt v. Car-Hale, 1 Gray, 237.

If a pilot refuses to board a vessel, he is liable for damages, civilly and criminally. *Comrs of Pilotage v. Low, R. M. Charl't, c. 220.*

Pilot has absolute control of vessel in absence of the master. *Snell v. Rich, 1 Johns., 203.*

It is the duty of the pilot to see that the ship is properly got under way (The Peerless, Lush, Adm., 20); that she is properly anchored, and to select the time and place of coming to anchor (The Northampton, 1 Spinks, Adm., 132; The George, 2 W. Rob., 286; 9 Jur., 670; The Massachusetts, 1 W. Rob., 351; The Arricola, 2 W. Rob., 109; to determine when the vessel should be brought up. The Louisville, 3 W. Rob., 310; 1 Eng. L. Reg., 631; Pollock v. McAlpin, 1 Moore, P. C., 47; The Maria, 1 W. Rob., 355.

If the owner is not obliged to take a pilot, the law only securing him a sufficient pilot if he wishes one, he is responsible for injuries resulting from the negligence of the pilot. *Atty-Gen. v. Case, 3 Price, 202; The Eden, 3 W. Rob., 442; Bussy v. Donaldson, 4 U. S. (4 Dall.), 205; The Lotty, Olcott, 223; The Carolina, 3 Curt., 69; Smith v. The Creole, 3 Wall., C. C., 426; The Neptune, 1 Doda, 427; The Peerless,*

signals were no indication of your real intention to cross; but according to your own account, they were given for an entirely different purpose, and so hurriedly, imperfectly and tardily, that any intelligent response to them was impracticable, and if your alleged signaling to helm a-star-board had been carried out, the result would, in all human probability, have been far more disastrous; and lastly, we reply that our pilot was neither incompetent nor intemperate, as you attempt to prove; and that the weight of evidence rather shows the allegation of the answer to be true, that The Cleona was in charge of young, unskillful, rash and imprudent pilots and was not in a seaworthy condition, etc.

Incompetency and intemperance of the pilot, Kribben, not having been proved, it is submitted that his conduct, under the circumstances of this case, is commendable and entirely relieves the appellees from liability.

See, *Chaplin v. Hawes*, 8 C. & P., 554; *The Grace Girdler*, 7 Wall., 198 (74 U. S., XIX., 113).

Mr. Justice Davis delivered the opinion of the court:

This is a case of collision occurring on the Mississippi River, a few miles above New Orleans, and is surrounded with the usual difficulty growing out of the conflicting character of the evidence.

There is some excuse, even for the party in fault, when two boats collide in tempestuous or foggy weather, or on a dark night, but there are no exculpatory circumstances attending this disaster. It happened before dark, in the middle of the Mississippi, and when the light was good enough to distinguish small objects on both banks of the river. The weather was clear and calm, and the river unobstructed, affording ample room for passage on either side of the point where the vessels collided.

Notwithstanding there were so many things to favor good navigation, the collision resulted in the drowning of two seamen and the wreck of the smaller steamer. It is very plain that it ought to have been avoided, and the inquiry is: who is to blame for it? It almost uniformly happens in cases of this description that different accounts are given of the occurrence by those in the employment of the respective vessels, and that the court has difficulty in this conflict of evidence of deciding to which side a preferable credence should be given. There are generally, however, in every case, some undeniable facts which enable the court to determine where the blame lies, and this case is one of that character.

There is no dispute that The Cleona, a small stern-wheel boat of the burden of 118 tons, left New Orleans on the evening of the 28th of August, 1869, at about 5 P. M., bound on a voyage to Donaldsonville, Louisiana, with an assorted cargo of merchandise for the various plantations on the coast, and that the steamboat Great Republic, of the burden of 2200 tons, a large and very fast vessel with side wheels, left New Orleans the same evening, some time after The Cleona, and bound on a voyage to St. Louis; that both boats crossed the river, from the right to the left bank, just above Nine-Mile Point, and

straightened up on the left bank and ran parallel with the shore for some time, The Cleona being some distance ahead, and The Republic following almost in her wake; that just previous to reaching Twelve-mile Point, The Cleona started to cross the river in an oblique direction, intending to make a landing at Waggaman's plantation to put out freight; that The Republic kept bearing to the left, following The Cleona, instead of keeping her course, and finally overtook her about the middle of the river, and the collision occurred. There is a great deal of discrepancy in the testimony relative to the distance between the two boats at the time The Cleona started to cross for the Waggaman plantation, the libelant's witnesses placing the distance at from six to seven hundred and fifty yards, while the witnesses for the respondents locate it all the way from forty to three hundred yards. Under the most favorable circumstances it is impossible to measure distances on the water with accuracy, but in times of excitement there is very little reliance to be placed on the opinion of any one on this subject, and especially is this so when the condemnation of a boat may depend upon it. If The Cleona was only some two or even three hundred yards ahead of The Republic, it was certainly imprudent in her officers to undertake to cross the river, but if she was more than double this distance in advance, there is no reason why she should not cross if she had business on the opposite side.

Without discussing the testimony to show on which side the probabilities are, there are certain things in connection with this part of the case which are inconsistent with the theory advanced by the respondents. According to the testimony of nearly all the witnesses, The Republic was going twice as fast as The Cleona, or, in other words, making two hundred yards to The Cleona's one hundred. It is quite clear that The Cleona was not more than forty or fifty yards from the left shore when she turned to cross over, and must have sailed to reach the middle of the river (a half mile wide at that point and confessedly the place of collision) nearly, if not quite, four hundred yards, and occupied, at her rate of speed, at least two minutes of time in doing it. As The Republic was swinging to the larboard, which would increase her distance outside of The Cleona, she must have gone considerably over eight hundred yards to reach the point of collision. Besides, if the distance between the two boats when The Cleona undertook to cross was as short as the respondents say, the collision would have occurred much sooner, as the speed of The Republic, by the weight of the testimony, was twelve miles an hour, enabling her to make three hundred and fifty yards in one minute. It would, therefore, seem quite clear that The Cleona was far enough ahead to cross with safety, on the supposition that the following boat would pursue the prescribed rules of navigation. Apart from this view of the subject The Republic cannot escape condemnation if the case be tested by the account which the pilot at the wheel gives of the affair. He says that he thought when The Cleona turned to the larboard she was sheering—running off from the shore; that at this time The Republic was below her in the current about two hundred and fifty or three hundred

yards, and to the larboard of her about the same distance; that as soon as The Cleona sheered to the larboard he pulled to the larboard, and rang the stopping and backing bells, and that The Cleona gave no signal until she had been running out about half a minute, when she blew two blasts of her whistle, and that the collision occurred in about half a minute from the time the backing bells were rung. This pilot acted on the belief that The Cleona had sheered when she made the sudden turn and, therefore, followed her until he overtook her in the middle of the river, instead of keeping his course, which the whole evidence shows would have prevented the collision.

That The Cleona's movement was not a mere sheer is manifest enough, but what right had the pilot to proceed on that supposition? Impressions of this sort are not admissible, and ought never to be entertained by a pilot, and if disaster occurs, the consequences must rest on the boat he is guiding. The cause of this collision is clearly traceable to this mistake and, to use no harsher term, the pilot showed great incapacity on the occasion. It was his duty to have kept his course, and if he had done this instead of swinging to the larboard, the accident would not have happened. Even had he ported his helm but for a few seconds after the danger was imminent, it would at least have checked the swinging of his boat to the larboard, and this would have prevented the disaster, as the evidence shows that ten feet would have cleared The Cleona, and five feet saved everything except a few of her wheel-arms.

As boats are not apt to sheer in deep water there was no excuse for the mistake made by the pilot. If, however, sheering were possible, as it is out of the common course of things, ordinary prudence would have told this pilot to have exchanged signals, so as to have understood what the movement was. Instead of this he did not answer the signals of The Cleona, which the law says he must do, in order to avoid mistakes. Two whistles were blown on The Cleona, which this pilot and others on board The Republic interpreted as meaning but one signal. Whether these whistles constituted one signal or two, answer should have been made and it may be if this had been done, the result would have been different.

The signals were given by The Cleona for each boat to keep to the right and, if seasonably given, were the proper ones.

It is said, however, that The Cleona should have given three whistles, indicating a purpose to land, but the boat was not close enough to land, and all the signal that was required was one which should tell which side she desired to take.

But the pilot says no signal was given by the Cleona until half a minute after she turned to cross. If so, and The Cleona omitted such a plain matter of duty, why did he not supply this omission by signaling as soon as he discovered the danger? That he thought danger was imminent as soon as The Cleona made the turn is manifest, because he says he rang the bells at once to stop and back. It was, however, his duty, as his boat was astern and gaining rapidly on the other, to have given the first signal; but if this were not so, any self-possessed pilot, having a due regard for life and property,

as soon as danger was threatening, would have signalled in order to call the attention of the other boat to the condition of things. If this had been done, is there any reason to suppose the signal would not have been obeyed? And if obeyed the courts would never have been troubled with this case. The precautions against danger of necessity, in any case, rest to a greater extent upon the boat in the rear than upon the boat in advance, and this is eminently true of a large and fast steamer following a small and slow boat. *Whitridge v. Dall*, 23 How., 454 [64 U. S., XVI., 553].

But the pilot says that as soon as The Cleona turned to cross, he took instant means to stop and back his boat. If so, it is singular that his boat, having two hundred and fifty yards to go, almost in the same direction with The Cleona, run her down with great violence; but the testimony of the engineer of The Republic shows, unmistakably, that the pilot, to say the least, is mistaken in this particular. Indeed, it is very doubtful from the evidence whether the engines of The Republic were stopped at all until the collision occurred; but if they were, it was at a point of time much later than that named by the pilot. It is true the pilot gave the signal to stop and back, and this signal was obeyed, but the engineer does not know how far off The Cleona was when he was signalled to stop and back, nor can he tell what period of time elapsed between the first ringing of the bell and the collision. He does tell, however, the important fact that The Republic, going up stream at the rate of twelve or fourteen miles an hour, can be stopped "dead" in seventy-five yards, and gives the reason why she can be stopped quicker than ordinary boats of her class navigating the Mississippi River.

In the light of this testimony, which must be accepted as true in the absence of any evidence to the contrary, plainly the pilot did not take the steps to check the speed of his boat when he says he did nor, in fact, until the collision was inevitable.

There is evidence in the record tending to show that the pilot was addicted to drinking when ashore, and he confesses to drinking on that day, but not for six hours before he left port. It may be that he was not under the influence of liquor on this occasion, but if not, his conduct is inexplicable on any other theory than ignorance of the ordinary rules of navigation, or reckless inattention to duty. There were ample means and opportunity to avoid this collision, and yet it occurred. In the midst of danger, seconds of time are important, not to speak of minutes, and the clear-headed pilot who recognizes this fact, and makes no ventures, is not apt to bring his boat into trouble. Practical steamboat men, passengers on board The Republic, understood the movement of The Cleona to be for the purpose of crossing the river, and yet the pilot in charge mistook it for sheering. They could see plainly enough if he kept his course the collision would have been avoided, and there was plenty of room to pass on the starboard, and he took exactly the opposite direction. With ability to stop his boat in seventy-five yards, he does not do it in two hundred and fifty yards. In charge of the wheel of one of the fastest and largest steamers on the river, and in plain sight, all the way from New Orleans,

of a small coasting vessel engaged in landing freight and passengers at the plantations on both sides of the river, he runs her down with such violence as to cause her to careen over, without using any signals at all, or answering those she gave, or taking any precaution until too late to escape danger. If all this does not constitute mismanagement, to use no harsher word, it is difficult to understand what does. The slightest exercise of ordinary skill and prudence would have avoided the accident. Even after the peril was imminent, the simple act of bearing to the starboard, instead of the larboard, would have brought The Republic's stem clear of The Cleona's stern.

There are other witnesses for the respondents who, in the matters of distance and time particularly, differ with the pilot at the wheel, but we do not feel called upon to review their testimony, as it does not, in our judgment, change the result, and would unnecessarily lengthen this opinion.

It may be that this collision would have been avoided if there had been any proper officer in good season on the roof of The Republic superintending her navigation. The pilots seem to have had, on this occasion, the whole charge of her navigation, for the captain, whose watch it was, was sitting on the lower or boiler deck, talking to a passenger, until his attention was called to the danger of a collision.

Under the circumstances of this case, the burden is on The Republic to excuse herself, she being the following vessel, and having actually overtaken The Cleona and run her down. And in any case of collision, whenever it appears that one of the vessels has neglected the usual and proper measures of precaution, the burden is on her to show that the collision was not owing to her neglect. U. S. District Court, Southern District of New York, *Meyer v. The Newport*, opinion by Judge Blatchford, reported in 14 Int. Rev. Rec., page 87; *The Lion*, 1 Sprague, 40.

If we are correct in our own interpretation of the evidence, enough has been said to condemn The Republic, and there is nothing in the record to excuse her.

As we have seen, she could have avoided this collision, even after danger was imminent. If she had stopped, or ported her wheel a second or two before the collision occurred, she would have gone clear of The Cleona. On the contrary, The Cleona's course after she saw The Republic following her, was to try and get out of her way. This course she pursued diligently, for she packed on all the steam possible, and succeeded so far as to save her hull, and came near escaping altogether. On a full and fair consideration of the whole evidence, we are satisfied the officers of The Cleona, when the boat was turned to the right shore, had no ground to fear a collision, and that the boat itself was far enough ahead to cross with safety, if The Republic, instead of following after her, had pursued her course on the left side of the river. It is pretty clear that The Cleona did not blow her whistle for each boat to keep to the right, as soon as she started for the opposite shore. This omission was a fault, but this fault bears so little proportion to the many faults of The Republic, that we do not think, under the circumstances, The Cleona should share the con-

sequences of this collision with The Republic.

Without pursuing this subject further, we are satisfied that the defense is not sustained and that the circuit court ought to have entered a decree for the libellant.

The decree of the Circuit Court is reversed and the cause remanded, with directions to enter a decree for the libellant and for further proceedings in conformity with this opinion.

Cited—2 Flipp., 161, 256; 2 Hughes, 144.

COUNTY OF ST. CLAIR. *Plff. in Err.*,

v.

JOHN B. LOVINGSTON AND THE WIGGINS FERRY COMPANY.

(See S. C., 23 Wall., 46-69.)

Boundaries—on river—alluvion—right to—on what streams.

1. Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation, between the river and the river boundary of such tract.

2. Where the calls in a conveyance of land are for two corners at, in or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary.

3. Alluvion is an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous.

4. The test as to what is gradual and imperceptible is, that although the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.

5. The riparian right to future alluvion is a vested one. It is an inherent and essential attribute of the original property.

6. The principle applies alike to streams that do and to those that do not overflow their banks, and where dikes and other defenses are and where they are not necessary to keep the water within its proper limits.

[No. 608.]

Submitted Nov. 24, 1874. Decided Dec. 7, 1874.

IN ERROR to the Supreme Court of the State of Illinois.

The case is stated by the court.

Mr. Gustavus Koerner, for plaintiff in error:

The doctrine of accretions is found fully developed in the Roman law.

The acquisition of a thing, because it be-

NOTE.—Alluvion or accretion and reliction; right to and ownership of; by what law, title to is determined; rule of division among riparian owners. See note to *Kennedy v. Hunt*, 48 U. S. (7 How.) 586.

This case affirms *Lovingston v. County of St. Clair*, 64 Ill., 56; S. C., 16 Am. Rep., 516.

Whatever addition is made to the shore of rivers or streams by alluvion, from natural causes or from a union of natural and artificial causes, belongs to the riparian owners of the shores. *Adams v. Frothingham*, 3 Mass., 352; S. C., 3 Am. Dec., 151; *People v. Central R. R. Co.*, 42 N. Y., 315.

Islands in an unnavigable river, if altogether on one side of the dividing line, belong to him who owns the bank on that side; if formed in the middle of the river so as to divide the channel partly on each side of the thread of the river, they will be divided between the owners of the opposite banks according to the original thread of the river between them. *Ingraham v. Wilkinson*, 4 Pick., 268; S. C., 16 Am. Dec., 342; *Inhab. of Deerfield v. Arms*, 17 Pick., 41; S. C., 23 Am. Dec., 276; *Hopkins Academy v. Dickinson*, 9 Cush., 548.

comes connected with another thing already belonging to a person, was called by the civilians *accessio*, of which *alluvio* (accretion) was only a species.

Alluvion is an accretion of a tract of land, bounded by a river, the owner of which is not limited by a certain measure. It does not apply to what is called *ager limitatus*.

Sec. 20, Inst. *de rerum divisione et qualitate*; Lex. 7, Dig., sec. 3; also Lex. 12 *Ibid.*; Lex. 16. *De acquirendo rerum dominio*, 41, 1. Lex. 24. Dig., sec. 3. *De aqua et aqua plur.*, etc., 39, 8. Lex. 1. sec. 1. Dig., *De flumin.*, 43, 12.

Alluvion must be gradual and imperceptible by natural causes.

Sec. 20. Inst. *De rerum divisione*, 2, 1. Lex. 7, sec. 1, Dig., *De acquirendo rerum dominio*. 41, 1.

If an island is formed between an island and the shore, it is to be divided between the owner of the island and the owner of the shore tract, which is also the case if the river should leave its bed between the shore and island, and in the measurement of division, the *recta gula* is to commence from the utmost boundary of the island, which is nearest the opposite shore.

Lex. 56, sec. 1, Dig., 41, 1. *De acq. rerum dominio*. Lex. 65, sec. 3. *Ibid.*

The common law of Germany is essentially the same.

See, Mittermayer, Principles of the Common Private Law of Germany, Vol. 1, sec. 147.

The words are: "The Roman law as to the formation of islands, alluvions, etc., is applied as the common law of Germany, though there are some deviations from it by laws of particular States, which often determine islands to belong to the sovereign."

The Code Napoleon defines alluvion as an accretion, which forms by and by and imperceptibly, on land bounded by a river.

Code Civil, title II., sec. 556.

The common law as to not navigable rivers has adopted the civil law, and according to it, an accretion is an addition of soil by gradual deposition, through the operation of natural causes, to the real estate already in possession of the owner.

2 Washb. Real Prop., sec. 551; 1 Bouv. L. Dic., Alluvion, p. 94; 3 Kent, 428; Ang. Water-Courses, sec. 58.

From the foregoing we deduce two points:

1. The accretion must be produced by natur-

al means and not by artificial ones, particularly if such artificial ones are made by other than the riparian owner.

2. It must be clear and apparent by the grant, that the land to which an accretion is claimed was actually bounded by the river.

Ang. Water-Courses, as to river boundaries, secs. 11, 15, 16, 18, 20, 23.

Now, as to the first point; the evidence clearly shows that as late as 1864, where this land now is, there was some water. Some bars had formed out in the river south of Island No. 3, but there was a channel on this side of the island, although not the main channel. Those bars near the island, and some accretions to the island, were formed by improvements made north of the island, by the United States Government, throwing the river towards the City of St. Louis. The land in question was made by the dike constructed by the City of St. Louis, about a mile above, connecting Bloody Island, or Island No. 3, with the main shore on the Illinois side, and more particularly by the improvements being made and enlarged from 1852 on. The upper dike stopped up the channel, the lower prevented the back-water from forming a large arm of the river or a lake up to the upper dam. Those sand-bars forming in the river, of which McClintock and Jarrot speak, would have met the island in course of time and prolonged it toward the south; but a part of the Mississippi would still have run between the island and main bank, but for the dikes. The binding of the shore by the Wiggins Ferry Company had only the effect of keeping the land made by those two dikes.

As to the second point; upon all the authorities we insist that accretions do not inure to the owner of the bank, whose boundaries are well defined in the grant; in other words, not to an "*ager limitatus*." We presume there is no exception to this rule existing, as we have seen, in the civil, the German, the French, and the common law of England.

The Supreme Court of Illinois has in no instance, far as it has gone to extend the rights of riparian owners, obliterated this landmark. It has taken care to refer to it in all the various decisions on the subject.

Middleton v. Pritchard, 3 Scam., 510; *Chicago v. Laflin*, 49 Ill., 175.

Mr. Wm. H. Underwood, for defendants in error:

Riparian owner is entitled to all accessions made to his land by the retreating of the river from its former limits, or by slow and secret deposit so as to leave the soil theretofore inundated uncovered by water. *Hagan v. Campbell*, 8 Port., 9; S. C., 33 Am. Dec., 267; *Girard v. Hill*, 1 Gill & J., 249; *Patterson v. Gelston*, 23 Md., 447; *Mento v. Delaney*, 7 Or., 337; *Lammers v. Nissen*, 4 Neb., 245; *Benson v. Morrow*, 61 Mo., 353; *Barney v. Keokuk*, 94 U.S., 324 (XXIV.); *Niehaus v. Shepherd*, 26 Ohio St., 45; *Cook v. Burlington*, 30 Iowa, 94; S. C., 6 Am. Rep., 649.

The accretion must be imperceptible. It will be sufficient if the deposit cannot be detected by the eye in any moment of time. *Kraut v. Crawford*, 18 Iowa, 554; *Benson v. Morrow*, 61 Mo., 352.

The general rules of alluvion apply where the formation is due to artificial causes. *Godfrey v. City of Alton*, 12 Ill., 37; *Halsey v. McCormick*, 18 N. Y., 149; *Lockwood v. N. Y. & H. R. R. Co.*, 37 Conn., 367.

Legislature cannot deprive a riparian proprietor of his right to future alluvion that may be deposited upon his river front. *Municipality No. 2 v. Orleans Cotton Press*, 18 La., 122; S. C., 36 Am. Dec., 624.

Alluvion formed on the shore of a navigable river belongs to the shore owner. *Stephenson v. Goff*, 10 Rob., 99; S. C., 43 Am. Dec., 171.

Where the boundary line of land bordering on an artificial pond was expressed to commence at "a stake near the high water mark of the pond" and to run thence "along the high water mark of said pond to the upper end of said pond," the boundary line is fixed and permanent, and the grantee is not entitled to any accretions or land left dry by the pond receding. *Cook v. McClure*, 58 N. Y., 437; S. C., 17 Am. Rep., 270.

Reliction differs from alluvion in this: that the former term is applied to land made by the withdrawal of the waters by which it was covered. The withdrawal of the waters must be slow, gradual and imperceptible. The same general rules apply to it as to alluvion. *Murray v. Sermon*, 1 Hawks, 56; *Warren v. Chambers*, 25 Ark., 120; S. C., 4 Am. Rep., 23; *Boorman v. Sunnucks*, 42 Wis., 236.

If a river suddenly abandons its bed, the title to the soil thus left dry will remain unchanged. *Lynch v. Allen*, 4 Dev. & B., 62; S. C., 33 Am. Dec., 671; *Woodbury v. Short*, 17 Vt., 397.

There is no pretense or evidence that the United States authorities or the City of St. Louis, or the persons who constructed the dike above, or the railroad track below, did so for the purpose of producing these accretions. Riparian proprietors might incidentally suffer or gain by such public works; and the parties causing such public works to be constructed, never set up any claim to these accretions as a result of their labor. Had they done so, the claim would have been unavailing as against the owners of the property, who simply acquiesced in these works made for other purposes.

Even where soil is, by sudden action of the water, deposited upon the land of another, it does not belong to the first owner, when he suffers it to remain in its new position until it cements and coalesces with the soil of the second owner; in which case the property of the soil is changed, and no right to reclaim it remains.

2 Washb. Real Prop., 452; Ang. Watercourses, sec. 60; Bouv. L. Dic., title Avulsion; *Woodbury v. Short*, 17 Vt., 387.

The title to land extends to the center of the earth and water over it.

3 Bl. Com., 18.

At common law the owner of land is under no legal or moral obligation to pay for improvements made on his land without his request.

Carson v. Clark, 1 Scam., 113; *Dooley v. Crist*, 2 Ill., 551.

The fact that these accretions may have been caused in part by the works of others, made for other purposes, is wholly immaterial.

Halsey v. McCormick, 18 N. Y., 150; *New Orleans v. U. S.*, 10 Pet., 662; *Jones v. Soulard*, 24 How., 41 (65 U. S., XVI., 604); *R. R. Co. v. Schurmeir*, 7 Wall., 287 (74 U. S., XIX., 78); *The Schools v. Risley*, 10 Wall., 110 (77 U. S., XIX., 854); *Godfrey v. Alton*, 12 Ill., 29.

The highest court in every State on the Mississippi River, from St. Paul to New Orleans, has decided that accretions belong to owners of land on that river, as riparian proprietors.

Schurmeier v. St. Paul & P. R. R. Co., 10 Minn., 82; *Kraut v. Crawford*, 18 Ia., 549; *Jones v. Pettibone*, 2 Wis., 308; *Walker v. Shepardson*, 4 Wis., 486; *Shelton v. Maupin*, 16 Mo., 128; *Smith v. St. Louis Pub. Schools*, 30 Mo., 290; *Warren v. Chambers*, 25 Ark., 120; *Thurman v. Morrison*, 14 B. Mon., 371; *Morrison v. Thurman*, 17 B. Mon., 253; *Stuart v. Clark*, 2 Swan, 9; *Memphis v. Overton*, 3 Yerg., 387; *Morgan v. Reading*, 3 Sm. & M., 366; *The Magnolia v. Marshall*, 39 Miss., 111; *Morgan v. Livingston*, 6 Mart., 19, 25; *Municipality No. 2 v. Orleans Ct. Press*, 18 La., 122; *Middleton v. Pritchard*, 3 Scam., 510; *Ensminger v. People*, 47 Ill., 388.

Mr. Justice Swayne delivered the opinion of the court:

This is an action of ejectment brought by the plaintiff in error to recover a tract of land in St. Clair County, Illinois, described as follows: "Bounded on the north by the northern line of the first ferry division of the City of East St. Louis; on the east by the west line of survey No. 579; on the west by the low water mark of the Mississippi River; on the south by the south line of survey 579, extending to low water mark of the Mississippi River."

The suit was brought originally in the Circuit
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Court of St. Clair County. The plaintiff there recovered. The defendants removed the case by appeal to the Supreme Court of the State. That court reversed the judgment and remanded the cause for further proceedings. It was retried in the lower court, the parties waiving the intervention of a jury. Judgment was given for the defendants. A motion was made for a new trial and overruled. The plaintiff excepted. The bill of exceptions embodies all the evidence given on both sides. The plaintiff appealed to the Supreme Court of the State, where the judgment was affirmed. The case has been brought here for review.

The plaintiff in error claims title under the Acts of Congress of July 15, 1874, ch. 301, 16 Stat. at L., 364; the Act of February 18, 1871, ch. 58, 17 Stat. at L., 416; the Act of September 28, 1850, ch. 84, 9 Stat. at L., 519; and under the Acts of the Legislature of Illinois of the 22d of June, 1852; of the 12th of February, 1853; of March 4, 1854; of February 18, 1859, and of March 11, 1869.

The defendants in error insist that the premises in controversy are a part of survey No. 579, and if not, that they are a part of survey No. 786, and claim title to those surveys under two patents, one to Jarrot, of the first of May, 1848, for survey 579, and the other to Cordaire, of the 31st of May, 1848, for survey 786. The survey last mentioned is represented in the patent to include surveys Nos. 579, 624 and 766, and the grant is made subject to the claims of those surveys.

The Act of Congress of July 15, 1870, declares:

"That the title of the United States to all lots, out-lots, tracts, pieces, parcels and strips of land in St. Clair County, State of Illinois, lying and situated outside of the United States surveys as noted in the field notes of the United States Surveyors and on the Mississippi River, near surveys 766, 624 and 579; and near and adjacent to fractional sections, 1, 2, 11 and 12; township one north range, ten west, third principal meridian, be, and the same is hereby confirmed and granted to said St. Clair County in said State: *Provided*, That nothing herein shall apply to the ancient French Commons in said County."

We shall lay out of view the question raised by the counsel for the defendants in error, whether it was the intention of Congress in the several Acts referred to, to grant any lands which had not been already surveyed and platted under the authority of the United States. We have not found it necessary to consider that proposition. We shall assume, for the purposes of this opinion, that all the title which could be passed by Congress and the State was and is vested in the plaintiff in error.

It is not denied that a valid title to surveys 579 and 786 is vested in the Wiggins Ferry Company. Lovington is their lessee.

The tract in dispute is alluvial land, formed by the waters of the Mississippi River. The defendants in error alleged that the surveys 579 and 786 were bounded originally by the river, and that the addition made by the accretion belongs to the owners of those surveys by virtue of their riparian rights.

It is contended on the other side that the west boundary of both surveys is the same; that their

west line is the east line of the plaintiff in error; that their west boundary is a line originally established irrespective of the river line; that the surveys never extended to the river; that hence the alluvion is no part of either survey, and that the plaintiff in error, as their grantee, owns the land from the west line as so originally established, to the present water line, embracing the entire alluvial tract in question; and further, that if the surveys or either of them did, as is insisted by the defendants in error, originally extend to the river, the accretion belonged to the United States and not to the owners of the survey, and that such title of the United States is vested in the plaintiff in error.

Two questions are thus presented for our determination:

One is, whether the river line was the original west boundary of the surveys, or either of them.

The other, if this inquiry be answered in the affirmative, is, to whom the accretion belongs.

The first is a mixed question of law and fact. The second is a question of law.

Before entering upon the examination of the first of these questions, it may be well to advert to a few of the leading authorities apposite to this phase of the case.

It is a universal rule that course and distance yield to natural and ascertained objects. *Preston v. Bowmar*, 6 Wheat., 580. A call for a natural object, as a river, a spring or even a marked line, will control both course and distance. *Newsom v. Pryor*, 7 Wheat., 7.

Artificial and natural objects called for, have the same effect. *Barclay v. Howell*, 6 Pet., 499; *Baxter v. Evelt*, 7 Mon., 333.

In a case of doubtful construction, the claim of the party in actual possession ought to be maintained, especially where it has been upheld by the decision of the state tribunals. *Preston v. Bowmar*, *supra*.

A patent called "To begin on the Ohio River, and then for certain courses and distances, without any corners or marked lines, to the mouth of the Kennebec, and then certain courses and distances, without any courses or marked lines, to a stake in the Ohio River." If the river was the boundary, the land in controversy was within the patent. If the courses and distances prevailed, the patent did not affect it. The court said: "It is our opinion that the river is the boundary." It was added: "Two of the calls are on the river. There are no intermediate marked lines or corners. The general description is, 'to lie on the Ohio.' These facts alone would not leave room for any other construction of the patent." *Bruce v. Taylor*, 2 J. J. Marsh., 160. This case is very instructive, and contains much additional argument in support of the view expressed. *Cockrell v. McQuinn*, 4 Mon., 62, is to the same effect. In the latter case the court said: "None will pretend that the legal construction of a patent is not a matter proper for the decision of the court whose province it is to decide all questions of law." In *Bruce v. Morgan*, 1 B. Mon., 26; the rule laid down in *Bruce v. Taylor* [*supra*], was re-affirmed.

Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the

river boundary of such tract. *Churchill v. Grady*, 5 Dana, 100.

Where a deed calls for a corner standing on the bank of a creek, "thence down said creek with the meanders thereof," the boundary is low water mark. *McCulloch v. Allen*, 8 Ohio, 309; *Handly v. Anthony*, 5 Wheat., 380.

Where a deed calls for an object on the bank of a stream, "Thence south, thence east, thence north to the bank of the stream, and with the course of the bank to the place of beginning," the stream at low water mark is the boundary. *Lamb v. Bickels*, 11 Ohio, 311.

Where the line around the land was described as "Running to a stake at the river, thence on the river N. 6° 40' 23 perches, thence N. 89° 50' W. 33 perches, thence N. 20° 20' 35 perches and 8 links to a stake by the river," it was held that this description made the river a boundary. *Riz v. Johnson*, 5 N. H., 520.

Where premises above tide-water are described as bounded by a monument standing on the bank of the river, and a course is given as running from it down the river as it winds and turns to another monument, the grantee takes *usque filium aquae*, unless the river be expressly excluded from the grant by the terms of the deed. *Luce v. Carley*, 24 Wend., 451.

The eastern line of the City of St. Louis, as it was incorporated in 1807, is as follows: "From the Sugar Loaf east to the Mississippi; from thence by the Mississippi to the place first mentioned." This court held that the call made the city a riparian proprietor upon the river. It was said in this connection that "Many authorities resting on adjudged cases have been adduced to us in the printed argument, presented by the counsel for the defendant in error, to show that, from the days of Sir Matthew Hale to the present time, all grants of land bounded on fresh water rivers, where the expressions designating the water line are general, confer proprietorship on the grantee to the middle of the stream, and entitle him to the accretions. We think this, as a general rule, too well settled, as part of the English and American law of real property, to be open to discussion." *Jones v. Souldard*, 24 How., 44 [65 U. S., XVI., 604]; *Schurmeier v. R. R. Co.*, 10 Minn., 82; *Shelton v. Maupin*, 16 Mo., 124.

It may be considered a canon in American jurisprudence, that where the calls in a conveyance of land, are for two corners at, in or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise. Whether, in the present case the limit of the land was low water, or the middle thread of the river, is a question which does not arise, and to which we have given no consideration. The point was considered in *R. R. Co. v. Schurmier*, 7 Wall., 287 [74 U. S., XIX., 78].

Survey 579 is the elder one. Its calls are: "Beginning on the bank of the Mississippi River, opposite to St. Louis, from which the lower window of the United States storehouse in St. Louis bears N. 70½ W.; thence S. 5 west 160 poles to a point in the river from which a sycamore 20 inches in diameter bears S. 85 E. 250 links; thence S. 85 E. 130 poles (at 30 poles a

slash) to a point; thence N. 15 W. 170 poles to a forked elm on the bank of Cahokia Creek; thence N. 85 W. 70 poles to the beginning."

It will be observed that the beginning corner is on the bank of the river. The second corner is a point in the river. The line between them is a straight one. Where the course as described would have fixed the line does not appear.

There was an obvious benefit in having the entire front of the land extend to the water's edge. There was no previous survey or ownership by another to prevent this from being done. No sensible reason can be imagined for having the two corners on the river, and the intermediate line deflect from it. Under the circumstances, we cannot doubt that the river was intended to be made and was made the west line of the survey. In the light of the facts, such is our construction of the calls of the survey, and we give them that effect.

The calls of survey No. 786, as respects this subject, are: "Thence N. 85° W. 174 poles, to a post on the bank of the Mississippi River, from which —; thence N. 5° E. up the Mississippi River and binding therewith (passing the southwesterly corner of Nicholas Jarrot's survey, No. 579, claim No. 99, at 6 poles), 551 poles and 10 links, to a post northwesterly corner of Nicholas Jarrot's survey, No. —, claim No. 100, from which a sycamore 36 inches diameter bears S. 21° W. 29 links; thence S. 85° E. with the upper line of the last mentioned survey 88 poles to the beginning."

Here the calls as to the river are more explicit than in survey No. 579. The language "up the Mississippi River and binding thereon," leaves no room for doubt. Discussion is unnecessary. It could not make the result clearer. The river must be held to have been the west boundary of this survey also.

In reaching these views we pervert no principle of law or justice. Our conclusions are sustained by authority and reason.

This brings us to the consideration of the second question.

It is insisted by the learned counsel for the plaintiff in error that the accretion was caused wholly by obstructions placed in the river above, and that hence the rules upon the subject of alluvion do not apply. If the fact be so, the consequence does not follow. There is no warrant for the proposition. The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural or affected by artificial means is immaterial. *Halsey v. McCormick*, 18 N. Y., 147; 3 Washb. R. Prop., 48.

The law in cases of alluvion is well settled.

In the Institutes of Justinian it is said: "Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase, and that is added by alluvion which is added so gradually that no one can perceive how much is added at any one moment of time." Lib. II., tit. I., sec. 20.

The surveys here in question were not within the category of the *agri limitati* of the civil law. The latter were lands belonging to the State by right of conquest and granted or sold in plats. The increase by alluvion in such cases did not belong to the owner of the adjoining plat.

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D. XLI., 1, 16; Sanders, Inst., 177; see, also, *Morgan v. Livingston*, 6 Mart. La., 251.

The Code Napoleon declares:

"Accumulations and increase of mud formed successively and imperceptibly on the soil bordering on a river or other stream is denominated 'alluvion.' Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream or one admitting floats or not; on the condition, in the first place, of leaving a landing place or towing path conformably to regulations." Book II. of Prop., etc., sec. 556.

Such was the law of France before the Code Napoleon was adopted. 4 Nouv. Dict. de Brillon, 278; *Morgan v. Livingston*, 6 Mart., 243.

And such was the law of Spain. Partid., III., tit. XXVIII., Law 26.

Blackstone thus lays down the rule of the common law:

"And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion be sudden or considerable, in this case it belongs to the King; for, as the King is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry." 2 Com., 262; see, also, Woolrych, L. Waters, 84; and Shultes, Aquatic Rights, 116.

Blackstone takes his definition from Bracton, lib. 2, ch. 2. Bracton was a judge in the reign of Henry III., and the greatest authority of his time. Hale, in his *De Jure Maris*, says Bracton followed the civil law. Hale himself shows the great antiquity of the rule in the English law. *De Jure Maris*, 1st pt., ch. 6; see, also, *King v. Yarborough*, 1 Dow & C., App. Cas., 178.

Chancellor Kent, the American commentator, recognizes the rule as it is laid down by the English authorities referred to. 3 Kent, Com., 428.

By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. *Martin v. Waddell*, 16 Pet., 367; *Russell v. Jersey Co.*, 15 How., 426. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones. *Pollard v. Hagan*, 3 How., 212; *Goodtitle v. Kibbe*, 9 How., 471; *Hallett v. Beebe*, 13 How., 25; *Withers v. Buckley*, 20 How., 84 [61 U. S., XV., 816].

The question here under consideration is not a new one in this court. In *New Orleans v. U. S.*, 10 Pet., 662, it was said: "The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial

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[illegible][illegible]

In England the rule which is applied to gradual accretions on the shores of fresh waters is applied also to such accretions on the shores of the sea. *King v. Yarmborough*, 3 Dow & C. App. Cas., 178.

We may well hold that the adjudications of this court to which we have referred are decisive of the case before us. They are binding upon us as authority. We are of the opinion that the United States never had any title to the premises in controversy, and that nothing passed by the several Acts of Congress and of the Legislature of Illinois, relied upon by the plaintiff in error.

The judgment of the Supreme Court of Illinois is affirmed.

Cited—42 Wis., 244; 54 Ind., 475; 23 Am. Rep., 658.

UNITED STATES, *Appt.*,

U.

JOHN L. VILLALONGA.

(See S. C., 23 Wall., 35-45.)

Right of factor—captured and abandoned property—factor, not owner—and can recover only special interest.

2. A female informant, who may have made reference to the informant assigned to him, has the military title which is sometimes called a "female informant" and is never regarded as a general informant.

It is held that the Government constituted itself the trustee of the land and it is abandoned property for the purpose of the trust and the trust cannot extend to the benefit of the wife of a special property interest but to the extent of its interest which, in this case, is limited to the amount of his life interest in the land.

1. That there is no return of the captured property, having a right in the proceeds thereof, with the meaning of the Captured and Abandoned Property Act.

4. The person who has it in the 3d section of the California and Amendment Property Act, having a right in the proceeds thereof, is he who has the legal interest in those proceeds and a factor who made advances for the mortgage can, at most, recover only to the extent of his loan.

NY 2341

Submitted Dec. 2, 1875. Detailed Dec. 14, 1875.

APPEAL from the Court of Claims.

The case is stated by the court.

**Messrs. Geo. H. Williams Atty-Gen., and
J. A. G. Smith, Asst. Atty-Gen., for appellant:**

A petite cause, is the same action, join a demand in his own right, and a demand as representative of another, or autre droit.

(25 P., 301.

A man cannot win an action in his own right and act as administrator or executor.

2 Vin. Abr., 47, pt. 5; Com. Dig., 139; *Reg-
ers v. Cook*, 1 Saik., 10.

That the character in which suit is brought determines the rights and responsibilities of the plaintiff in the use and enjoyment of the debt recovered. see, 2 Vin. Abr., 47, pt. 6; Com. Dig., Actions, G.

"The remedy of agents for mere torts is confined to cases (a) where their right of possession is injuriously invaded; (b) or where they incur a personal responsibility; (c) or loss, or damage in consequence of the tort.

Story, Ag., 416.

(a) The right of the factor to the possession of this property was limited by the amount of his advances, and to the extent of the interfer-

NOTE.—Factor's Men.

A factor has a lien upon property of the principal in his possession for his commissions, advances and expenses. This lien covers a general balance on the accounts between the factor and the principal so far as concerns the business of factorage. *Kruger v. Wilcox*, 1 Amb., 253; *McKenzie v. Nevius*, 22 Me., 138; S. C., 38 Am. Dec., 291; *Sewall v. Nichols*, 34 Me., 562; *Martin v. Pope*, 6 Ala., 532; S. C., 41 Am. Dec., 66; *Sawyer v. Lorillard*, 48 Ala., 323; *Grieff v. Cowgwill*, 2 Dis., 54; *Knapp v. Alvord*, 10 Paige, 205; S. C., 40 Am. Dec., 241; *Brice v. Brooks*, 28 Wend., 367; *Winter v. Coit*, 7 N. Y., 238; *Ohio & M. R. R. Co. v. Kason*, 37 N. Y., 218; *Bowling Green, etc., Bk. v. Todd*, 52 N. Y., 491; *Myer v. Jacobs*, 1 Daly, 89; *Reynolds v. Davis*, 5 Sand., 257; *Winne v. Hammond*, 37 Ill., 99; *Patterson v. McGabey*, 8 Mart., 486; S. C., 13 Am. Dec., 298; *Cutters v. Bake*, 2 La. Ann., 572; *Canfield v. McLaughlin*, 9 Mart., 303; *McNeill v. Glass*, 1 Mart., N. S., 261; *Kirkman v. Hamilton*, 9 Mart., 297.

Before the lien attaches, the goods must be in the factor's hands with the owner's consent. It does not attach to goods which he has got into his hands in bad faith or by an illegal act. *Bank of Rochester v. Jones*, 4 N. Y., 497; *Winter v. Coit*, 7 N. Y., 288; *Marine Bank v. Wright*, 48 N. Y., 1; *Bruce v. Andrews*, 36 Mo., 508; *Bruce v. Wait*, 3 M. & W., 15; *Brown v. Wiggins*, 16 N. H., 312; *Elliot v. Bradley*, 23 Vt., 217; *Byers v. Danley*, 27 Ark., 77; *Rice v. Austin*, 17 Mass., 197; *Kinlock v. Craig*, 3 Term., 119.

Factor may, however, have constructive possession and a lien for advances where he has accepted drafts on faith of a certain consignment of

case with his special property, the laws of Georgia gave him an action of trespass, while a concurrent right of action is given to the bailor for interference with the personal property.

Code of Georgia, 1861, sec. 2969, and sec. 2970, p. 531; ed. of 1873, p. 530, sec. 3080, 3081.

But no right is given to the bailor or tenant in possession to recover in an action in his own name for the injury done to the rights of the general owner, remainder-man, or reversioner.

(b) The cotton having been taken under an authority of law, by a force which the factor could not resist, he has incurred no personal responsibility from its seizure. "For this reason (that he is chargeable to the bailor) he shall recover against a stranger who takes the goods out of his possession."

Fide, leading case in the Year Book, 91 Hen., 7, 14b, referred to in Story, Bailm., sec. 96; Edw. Bailm., p. 24.

"Unavoidable calamity or overwhelming force or accident without any default of the agent, will excuse him from strict performance."

Story, Ag., sec. 494.

(c) The personal loss or damage suffered by claimant of force, is measured by the value of the advances.

Correll v. U. S., 18 Wall., 151 (80 U. S., XX., 385).

With the right which a factor has to sue in his own name on a contract in his own name for the price mentioned in the contract, we have no concern, because: 1. There was no contract; 2. The agency of the factor ceased when the property was legally taken from his control. 3. If a contract is to be implied, it is such a one as the factor could not have made expressly and, therefore, *ultra vires*. 4. The implications of such a contract are to be found in the Act of Congress.

At the time of the seizure of this cotton there were two distinct titles to each bale, that of the general owner, which is the paramount title, and that of the special owner, which might have been divested at any time on payment of his

lien for advances, etc. To each of these owners Congress has given a remedy.

"And any person claiming to have been the owner of any such abandoned or captured property, may * * * prefer his claim to the proceeds thereof, in the Court of Claims, and on proof to the satisfaction of said court, of his ownership of said property and of his right to the proceeds thereof, * * * to receive the residue of such proceeds, etc." 12 Stat. at L., 830.

This court has held (*U. S. v. Padelford*, 9 Wall., 531 (76 U. S., XIX., 795); *U. S. v. Kline*, 18 Wall., 128 (80 U. S., XX., 519), that the right of possession did not change until actual seizure by the proper military authority; and that such seizure did not divest the title to the property. With the seizure, therefore, the factor's right of possession ceased, and also his ability to perform the duties imposed upon him.

Montgomery v. U. S., 18 Wall., 395 (80 U. S., XXI., 97).

The effect is the same as though the principal substituted a new factor.

That several and conflicting suits for their respective interests would have been in accordance with the practice of the Court of Claims, is evident, from the case of *Woodruff et al.*, 7 Ct. Cl., 605, where the respective conflicting interests of five claimants, who filed as many petitions were adjudicated.

That the failure of the owners to file their petitions, confers no additional rights upon this claimant, who must stand or fall on his own merits, see, *Fain's case*, 4 Ct. Cl., 387, and *O'Keefe's case*, 5 Ct. Cl., 674.

That a judgment for the interest of Villalonga in the proceeds of the cotton held by him as a factor, whether the owners have reserved or lost their right to file claims, would have been properly entered, see, *Mrs. Sykes' case*, 8 Ct. Cl., 530, and *U. S. v. Burns*, 19 Wall., 346 (79 U. S., XX., 388).

Judgment should not have been entered for any part of the 297 bales, without evidence showing the amount of claimant's interest therein.

Headman's case, 5 Ct. Cl., 640.

goods and bill of lading has been delivered or intended to him, or other documents show an intention to vest title in him. *Holbrook v. Wright*, 24 Wend., 155; 6 C., 35 Am. Dec., 607; *Dows v. Green*, 24 N. Y., 629; *Heard v. Brewer*, 4 Daly, 129; *Hall v. Hinks*, 26 Md., 695; *Haille v. Smith*, 1 Bos. & P., 522; *Anderson v. Clarke*, 3 Hug., 30; *Bryant v. Nix*, 4 M.

voluntary surrender of the property (*Lickbarrow v. Mason*, 8 East, 21; by neglect to enforce it (*Grieff v. Cowgill*, 3 Dia., 54; by wrongful sale or pledge of the property (*Rolly v. Huggesford*, 5 Pick., 73; 8 C., 19 Am. Dec., 308; *Jarvis v. Rogers*, 15 Mass., 269; by setting up another and untenable claim on the property (*Winter v. Colt*, 7 N. Y., 299); or by tender of amount due, *Scarfe v. Morgan*, 4 Mees. & W., 270; *Jones v. Tarleton*, 3 Mees. & W., 673.

Where factor is entrusted with goods to sell and pay principal's debt, he has only a qualified property in them, and his executors cannot lawfully dispose of them, but may retain them for his lien. *Gage v. Allison*, 1 Brev., 465; 8 C., 2 Am. Dec., 698.

Liability of factor on bills indorsed by him, with a reasonable apprehension of danger on that account, gives him a lien on other bills of his principal in his hands. *Hodgson v. Payson*, 3 Harr. & J., 389; 8 C., 5 Am. Dec., 429.

Where the agent of a foreign principal employs a sub-agent, all the security which the law gives to the immediate agent extends to the sub-agent. *McKensie v. Nevins*, 22 Me., 126; 8 C., 25 Am. Dec., 291; *Bowie v. Napier*, 1 McCord, 1; 8 C., 10 Am. Dec., 541.

Goods shipped to a factor cannot be seized on execution against the shipper when the factor, on the strength of the shipment, accepted drafts drawn by the shipper. *Lambeth v. Turnbull*, 3 Rob., 264; 8 C., 29 Am. Dec., 639.

Mere agreement to ship in satisfaction of antecedent debt, does not give factor lien on the goods till they come into his actual possession. *Dasha v. Fopa*, 6 Ala., 76; 8 C., 41 Am. Dec., 75.

Claimant's interest cannot be determined without proof of the value of confederate notes at the time the advances were made.

Messrs. John O. Herrill and Denver & Peck, for appellee:

"An agent having possession, actual or constructive, of the property of his principal, has a right of action for any interference of third parties."

New Code, sec. 2210.

The factor may resist even the principal himself until his advances are tendered.

Tyrus v. Rust, 34 Ga., 382.

This doctrine of the Code is based upon the decisions of our highest courts, which declare that a factor may sue for property of which he has been deprived illegally, and that his interest is sufficient to maintain trover.

Kollock v. Jackson, 5 Ga., 162; *Smith v. Kershaw*, 1 Kelly (Ga.), 259; *Liptrot v. Holmes*, 1 Kelly (Ga.), 881.

Mere possession of personalty, even if wrongful (except as against the true owner), gives a right of action for interference with such possession.

New Code, sec. 3027.

The Supreme Court of Georgia has further decided that a factor has such an interest in cotton consigned to him, even when *in transitu*, as will support a claim against a plaintiff in attachment or *fi. fa.*

Wade v. Hamilton, 30 Ga., 450; *Elliott v. Cox*, 48 Ga., 89.

So that the factor has not only his action of damages or trover, but in the event of a levy on the cotton consigned to him, his interest will support a claim to the property. This doctrine is in advance of the common law, but it is the law of Georgia, and must govern as the *lex loci*.

Mr. Justice Strong delivered the opinion of the court:

The 3d section of the Act of Congress of March 12, 1863, 12 Stat. at L., 820, which alone authorizes a suit against the United States for the recovery of the proceeds of sale of captured or abandoned property, enacts that "Any person claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims and on proof, to the satisfaction of the court, of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of said proceeds after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

Under this enactment the claimant in the court below sought to recover the proceeds of four hundred and ninety-three bales of cotton, which were seized by the Army of the United States at Savannah in December, 1864. After its seizure the cotton was turned over to the agents of the Treasury Department and sold, and the proceeds of the sale were paid into the Treasury. Of the whole number of bales captured, one hundred and ninety-six belonged to the claimant, but the remainder he had received

as a cotton factor from various persons, and had made advances thereon, in money of the Confederate States. The aggregate of these advances was \$51,153.17. It does not appear from the finding of facts who those different owners were, how much had been advanced to each, or what was the value of the advances in money of the United States. Upon this state of facts the Court of Claims gave judgment in favor of the claimant, not only for the proceeds of sale of the cotton which belonged to him in his own right, but also for the entire proceeds of that which he had received as a factor and upon which he had made advances. Whether this judgment was correct on such a state of facts, is the question now presented; and the answer to it must depend upon the antecedent inquiry whether, as to the cotton upon which the claimant had made partial advances as a factor, he can be considered the owner thereof, and having a right to its proceeds within the meaning of the Act of Congress.

No doubt a factor who has made advances upon goods consigned to him, may be regarded, in a limited sense, and to the extent of his advances, as an owner. Yet, in reality, he has but a lien with a right of possession of the goods for its security. He may protect that possession by suit against a trespasser upon it, and he may sell the property to re-imburse advances; remaining, however, accountable to his consignor for any surplus. But after all, he is not the real owner. He is only an agent of the owner for certain purposes. The owner may, at any time before his factor has sold the goods, reclaim the possession, upon paying the advances made with interest and expenses. He has not lost his ownership by committing the custody of the goods to a factor and by receiving advances upon them. He is still entitled to the proceeds of any sale which may be made, even by his agent, the factor, subject only to a charge of the advances and expenses. A factor, therefore, notwithstanding he may have made advances upon the property consigned to him, has but a limited right. That right is sometimes called a special property, but it is never regarded as a general ownership. At most, it is no more than ownership of a lien or charge upon the property. Such is, unquestionably, the doctrine of the common law. And there is nothing in any statute affecting this case that changes the doctrine. Certainly, the statutes of Georgia, whence this case comes, have no such effect. In the Code of that State of 1861, while a factor's lien is recognized and declared to extend to all balances on general account, and to attach to the proceeds of sale of goods consigned as well as to the goods themselves, there is nothing that declares he has anything more than a lien protected by his possession. Injuries to that possession may, indeed, be redressed by action in his name; and it may be assumed that upon contracts of sale made by him he may sue; but all this is perfectly consistent with the continuance of the general ownership in his consignor until he has made a sale. And there is a very significant clause in the statutes of the State which shows that a factor there has not the general property. In section 2969, of the article respecting injuries to personalty generally (Code of 1861, p. 552), it is enacted that "In cases of bailments, where the possession is in the bailee, a

trespass committed during the existence of the bailment will give a right of action to the bailee for the interference with his special property, and a concurrent right of action to the bailor for interference with his general property." If this applies to the case of bailment to a factor, as is supposed by the defendant in error, it is a clear declaration that the factor's right does not extend beyond a special property, a mere right to hold for a particular purpose, and that it does not amount to ownership of the property consigned to him. And there is nothing in the new Code of Georgia, or in any of the decisions of the Supreme Court, that is variant from this. Admit that a factor may maintain an action when his possession is disturbed, still it is a question what may he recover? Under the statutes of Georgia he can recover only for the injury which his special property, namely: his lien, has sustained. For all beyond that, the general owner may sue. The property of that owner is not vested in his factor.

If, then, it be, as was said by the *Chief Justice* in *Klein's* case, 18 Wall., 128 [80 U. S., XX., 519], that the Government constituted itself the trustee of captured or abandoned property for the original owners thereof, it is hard to see how the trust can exist for the benefit of the owner of a special property therein, beyond the extent of his interest, which, as we have seen, in case of a factor, is measured by the amount of his advances and expenses.

For all beyond that, by the law of Georgia, the original owner who consigned the goods to the factor might sue, and for that original owner the Government became a trustee of all beyond the factor's interest, according to the doctrine of *Klein's* case.

In this view of the case in hand, it is clear that the claimant is not the "owner of the" captured "property," "having a right to the proceeds thereof," within the meaning of the Captured or Abandoned Property Act. He owns of the cotton consigned to him nothing but a lien for his advances and expenses; and he is, therefore, not entitled to the entire proceeds of the sale of the property.

There are other considerations that support this conclusion. Plainly, it was the intention of Congress, manifested in the statute, that no person should be permitted to recover out of the Treasury any of the proceeds of sale of the property captured or abandoned, except those who had given no aid or comfort to the rebellion. But if a factor who has made advances, no matter how small, may recover the entire proceeds of a consignment made to him, not only what he has advanced, but the share of his principal, the intention of the law may be wholly defeated. He may have received consignments from persons most active in promoting the rebellion, and he may have advanced only \$1 on each bale of cotton consigned. If, now, he can recover the entire net proceeds of the sale of such cotton paid into the Treasury, his consignors, through him, using him as a cover, escape entirely from the operation of the provision of the statute—that no one shall have a standing in the Court of Claims who has given aid and comfort to the rebellion. A construction of the law which admits of such a consequence cannot be correct. The intention of Congress is not thus to be evaded.

See 23 WALL.

There is yet another consideration not to be overlooked. Under the Act of March 8, 1863, 12 Stat. at L., 765, amending the Act to establish the Court of Claims, that court has power to consider and determine all set-offs; counter claims, claims for damages, whether liquidated or unliquidated, or other claims which the Government may have against any claimant in the court, and render judgment against such claimant if he be found indebted to the Government. Can a debtor to the United States evade his liability to a judgment against him by consigning his property to a factor and obtaining some advances? May the factor recover all that is in the Treasury, though the Government may have large claims against his principals, who are the real parties in interest? We cannot think the Acts of Congress admit of such an interpretation. These considerations show that the "owner," spoken of in the 3d section of the Captured and Abandoned Property Act, "having a right to the proceeds thereof," is he who has the legal interest in those proceeds, and that a factor who made advances before the capture can, at most, recover only to the extent of his lien.

The court below rested their judgment upon *Carroll's* case, 18 Wall., 151 [80 U. S., XX., 565], but that case, in our opinion, has little analogy to this. There, an administratrix of a deceased person was the claimant, and it was held to be no bar to the suit that the decedent gave aid and comfort to the rebellion, the property having been taken after his death from the administratrix, and not from him, and the administratrix was declared to be the owner within the meaning of the statute. Undoubtedly she was the full legal owner, entitled, both in law and in equity, to the entire property. Hers was the only title which existed at the time of the capture. Through whom she acquired it was deemed immaterial. It was sufficient that no other person had a definite right. This is no such case. Here there are owners, both in law and in equity, other than the claimant, and the statute has opened the Court of Claims for them, if they have never given aid or comfort to the rebellion. The present claimant, at most, is entitled to no more than the net proceeds of sale of his own cotton, one hundred and ninety-six bales, and the amount of his advances on the other cotton, reducing those advances to their worth in the money of the United States at the time the advances were made.

The judgment is reversed and the cause is remitted, with instructions to proceed in conformity with this opinion.

Cited—2 McCrary, 500.

DAVID A. SECOMBE, *Plff. in Err.*,

v.

THE MILWAUKEE AND SAINT PAUL RAILWAY COMPANY.

(See S. C., 23 Wall., 108-119.)

Right of eminent domain—railroad is public necessity—proceedings to condemn land—judgment in, when conclusive.

1. The mode of exercising the right of eminent domain, in the absence of any provision in the or-

ganio law prescribing a contrary course, is within the discretion of the Legislature.

2. There is no limitation upon the power of the Legislature in this respect, if the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken.

3. The taking of private property in order that a railroad may be constructed, is a public necessity.

4. Prior occupation without authority of law would not preclude the Company from taking subsequent measures authorized by law to condemn the land for its use.

5. It is no objection that the amount of the award was never paid or tendered to the parties in interest, where a judgment was entered confirming the award, and the money paid into court for their use.

6. Where the judgment of condemnation is rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist, it is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction.

[No. 196.]

Submitted Dec. 2, 1874. Decided Dec. 14, 1874.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The general nature of the case is stated in the opinion. The following is a portion of the opinion of the court below, delivered by Nelson, *District J.*, Dillon, *Circuit J.*, concurring:

The Minneapolis, Faribault & Cedar Valley Railroad Company, by Act of Mar. 10, 1862, succeeded to all the rights of the Minneapolis & Cedar Valley Railroad Company, and August 19, commenced proceedings under the charter of the latter Company, passed Mar. 1, 1866, to condemn the lot in controversy.

Section 10 of this Act required, in substance, that the Company should give thirty days' notice of an application to the judge of the District Court of the State for the appointment of three commissioners to appraise the damages for right of way, by publishing the same in a newspaper in the county through which the road ran, and that, after the appointment of the commissioners, it should be their duty to cause ten days' notice of their meeting to appraise the damages of any land through which said road may run, to the owner or claimant thereof; provided that "The notice * * * shall be in writing and delivered to the owner or owners; * * * or, if non-residents, then said notice shall be published in the nearest newspaper to where said land is situated, at least four weeks before making said appraisalment."

The necessary steps were taken by the Company, commencing by the publication of a notice on the day aforesaid, that application would be made to the judge of the District Court of Hennepin County, Oct. 26, 1863, for the appointment of three commissioners. They were appointed by the judge on that day, and gave

the requisite notice of their meeting on Dec. 2, 1863, to appraise the damages to the lot, personally upon Pinney more than ten days before their meeting; and upon Osborne, who was not found by the person authorized to serve the notices, by publication of the same for period of four weeks in a newspaper printed in Minneapolis. The commissioners met Dec. 2, 1863. Pending these proceedings and before the commissioners had made and filed their award, the Act of Feb. 1, 1864, was passed changing the name of the Company to that of the Minnesota Central Railway Company, and providing, in section 22 of the same, that "The proceedings heretofore taken by said Company, for the appointment of commissioners to assess damages for lands taken by said Company, and the proceedings of such commissioners are hereby confirmed, and all proceedings in all cases pending at the time of the passage of this Act, shall be carried on and completed in conformity with the provisions of this Act, and with the same effect as is specified in this Act; and all proceedings heretofore taken in any case may be filed with the clerk of the county where the lands to which they relate are situated, with the like effect."

The Company, after this, perfected and completed its proceedings under section 20 of this Act of Feb. 1, 1864. The commissioners made their report Apr. 8, 1864, awarding the damages, and filed it on the 16th of the same month.

On July 26, 1867, the judge ordered the money awarded to be paid into court for the benefit of the parties interested, and judgment was entered condemning the property for the use of the Railroad Company and the money was paid under the order of Dec. 22, 1868.

We have examined the record and the proceedings in this case from the commencement to the final entry of judgment, and find that the Company pursued the statutory provisions.

It is urged by the plaintiff that section 10 of the Act of Mar. 1, 1856, and section 20 of the Act of Feb. 1, 1864, when followed, can confer no right to the property sought to be taken, for the reason that no proceedings in court are contemplated by these sections, and no notice of the award when filed is to be given, and no personal service of notice is to be made upon non-residents.

The Legislature of the State was the only competent tribunal to judge of the mode and manner of exercising the right of eminent domain within the constitutional limits; and having given this Company authority to obtain right of way and depot ground, by section 10 of the Act of 1856, and section 20 of the Act of 1864, it is our duty only, no question being raised as to the constitutionality of those sections, to see that the authority has not been exceeded.

The statute is the guide for the action of the Company, and if we find that it has conformed to the provisions of the several Acts laid down for its government in these proceedings, it is not our province to question the discretion of the Legislature.

In our opinion the judge of the district court, who appointed the commissioners, obtained jurisdiction of the proceedings. The notices were sufficient. The necessary steps were taken to secure the attendance of claimants to the lot at

NOTE.—State decisions govern U. S. Courts as to state statutes and as to rule of property. See note to *Clark v. Graham*, 19 U. S. (6 Wheat.), 577.

Jurisdiction of U. S. Supreme Court. It is for state courts to construe their own statutes. Supreme Court will not review their decisions except when specially authorized to by statute. See note to *Commercial Bk. v. Buckingham*, 46 U. S. (5 How.), 317.

In what instances U. S. Courts do not follow state decisions. See note to *U. S. v. Muscatine*, 75 U. S., XIX., 490.

Eminent domain; payment for private property taken for public use; right generally recognized. Fifth Amendment to U. S. Constitution applies only to Federal Government. See note to *Withers v. Buckley*, 61 U. S., XV., 816.

the meeting held to consider the amount of damages.

The 32d section of the Act of Feb. 1, 1864, confirmed the proceedings previously taken. No appeal was taken from the award to the court, where there might have been a trial by jury, and it is now too late for the owner or its assigns to object.

It is true that after the order was made for judgment and that the money be paid into court, several months elapsed before it was done. This delay, in our opinion, does not invalidate the judgment. No action was taken to have it set aside. The award was confirmed without complaint, and the owner cannot now attack it here on that account.

The record of the judgment has been completed, and the same with a certificate of satisfaction as against the Company, has been filed with the register of deeds of Hennepin County. This record is declared by law to be evidence of title to the lands described therein in the same manner and with like effect as deeds of real estate.

Mr. D. A. Snowds, in person, for plaintiff in error.

Messrs. F. B. E. Cornell and J. W. Cury, for defendant in error.

Mr. Justice Davis delivered the opinion of the court:

This is an action of ejectment, to recover possession of a town lot in Minneapolis, occupied by the defendant in error as a part of its road-bed. The case was tried by the court without the intervention of a jury, and the only material point for inquiry is, whether, on the whole case, the decision of the court below, which was adverse to the plaintiff, was correct. It is true there was an objection to the ruling of the court admitting evidence, but it is unnecessary to notice it, because this evidence was the basis on which this court rested its judgment, and without it the defense is not sustained.

The case was this: Hiram Osborne and Ovid Pinney were, in 1863, the owners of the premises in controversy, and in 1870, by deeds of quitclaim, conveyed all the right they had in the property to the plaintiff. Long before these conveyances, the Minnesota Central Railroad Company, under whom the defendant claims, located and built a railroad across the premises, and occupied it for railroad purposes.

The defendant insists that this occupation was lawful, for the reason that the Company took the proper steps to condemn the land, and had the right to condemn it. Whether this is so, of necessity, depends on the laws of the State; and if these laws have been construed by the highest

The Minnesota Central Company was authorized by law to procure the condemnation of land for the use of its road, and from the findings of fact by the Circuit Court it sufficiently appears that the statutory provisions on the subject were observed.

It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the Legislature. There is no limitation upon the power of the Legislature in this respect. If the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken. This general rule has received the sanction of the Supreme Court of Minnesota in cases analogous to the one at bar. *Weir v. R. R. Co.*, 19 Minn., 155; *Langford v. Comrs. of Ramsey Co.*, 16 Minn., 275.

It hardly need be said that the taking of private property, in order that a railroad may be constructed, is a public necessity. It is urged that the property in controversy was occupied before the proceedings in condemnation were begun, but there is nothing in the findings of fact to show that this was so. Even if the plaintiff were in a situation to make the objection it would not avail him, for prior occupation without authority of law would not preclude the Company from taking subsequent measures authorized by law to condemn the land for their use. If the Company occupied the land before condemnation without the consent of the owners, and without any law authorizing it, they are liable in trespass to the persons who owned the land at the time, but not to the present plaintiff.

It is urged, also, against the validity of the award of the commissioners, that it was not made in reasonable time, or the amount of it ever paid or tendered to the parties in interest. Whether this be so or not does not concern the plaintiff. It is enough for him to know that a judgment was entered confirming the award, and the money paid into the court for the use of Pinney and Osborne and is there now unless they have seen fit to withdraw it. It is a fair presumption, as both these persons had notice, actual or constructive, of the proceedings in condemnation, and took no steps to review them, that they were either satisfied with the award or concluded they could not make successful opposition to it.

This suit is an effort to question the propriety of the condemnation and sale of the property in a collateral proceeding, not by the party even whose land was appropriated, but by a stranger to the original proceeding, who, whatever his motive in buying, got no other estate than the original owners could convey—a fee subject to the easement of the Railroad Company. The judgment of condemnation in this case was rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. *Radf., Railw.*, 6th ed., 271.

If it were so, railroad companies would have no assurance that the steps taken by them to

procure the right of way would conclude anyone, and they would be constantly subject to vexatious litigation.

The judgment of the Circuit Court is affirmed.

Cited—31 N. J. Eq., 498; 72 N. Y., 217; 28 Am. Rep., 148.

PAUL H. LEWIS, *Appt.*,

v.

PHILIP G. COCKS, Sole Devisee and Legatee
of JOHN G. COCKS, Deceased.

(See 8. C., 23 Wall., 466-471.)

Bill to set aside judicial sale, when not sustained—adequate remedy at law—objection by court.

1. A bill to set aside a judicial sale, which alleges only the nullity of the judgment under which the premises were sold, by reason of the non-service of the original process in the suit upon the defendant, cannot be sustained.

2. In such cases, except there be fraud, there is a plain and adequate remedy at law and a court of equity will not interpose. An action of ejectment is an adequate remedy.

3. If such objection clearly exists, although it is not made by demurrer, plea or answer, nor suggested by counsel, it is the duty of the court *sua sponte* to recognize it and give effect to it.

[No. 86.]

Argued Nov. 25, 1874. Decided Dec. 14, 1874.

APPEAL from the Circuit Court of the United States for the Fifth Circuit and District of Louisiana.

The case is stated by the court.

Mr. P. Phillips, for appellant.

Mr. Conway Robinson, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity from a decree of the Circuit Court of the United States for the District of Louisiana.

The facts disclosed in the record, so far as it is necessary to state them, are as follows:

Robert Anderson held four promissory notes of Cocks, each for \$4,500 and interest. The notes were secured by a mortgage upon real estate in the City of New Orleans. In January, 1868, Anderson filed in the Second District Court of New Orleans a petition for the seizure and sale of the mortgaged premises. He claimed that the sum of \$13,500 was due upon the notes. Process was issued and property seized and sold. Anderson became the purchaser for the sum of \$7,500. The sale was on the 8d of March, 1868.

In the same month he filed a petition in the Provisional Court of New Orleans, claiming that Cocks was still indebted to him in the sum of \$8,339, besides costs, and praying that Cocks and Charles Hyllested, his agent, should be cited to appear and answer.

On the 30th of May, judgment by default was rendered in favor of Anderson for the sum of \$8,840, with interest according to the terms of the notes, and for the costs. Under the execution issued upon this judgment, two lots and the improvements thereon were seized and sold to Charles Izard, for the sum of \$1,550. Izard entered into possession and has refused to give up the property to Cocks. Cocks filed this bill.

Izard demurred. The demurrer was sustained and the bill dismissed.

The case was brought by appeal to this court. Here the decree was reversed and the cause remanded to the circuit court for further proceedings. *Cocks v. Izard*, 7 Wall., 559 [74 U. S., XIX., 275].

Thereafter, in that court, Izard answered. Lewis, the appellant, was subsequently made defendant in place of Izard, and also answered. Testimony was taken on both sides. At the hearing, the circuit court decreed in favor of Cocks. Thereupon Lewis appealed to this court. The case is thus brought here a second time. The bill claims relief upon three grounds:

1. That the provisional court was a nullity and its judgment against Cocks void.

2. That no service of process was made upon Cocks; that no sufficient service was made upon Hyllested, the agent of Cocks, and that Hyllested was not such an agent that valid service could be made upon him.

3. That Izard was guilty of a gross fraud touching the sale of the property by the Marshal; that he professed to be the friend of Cocks and to intend to buy in the property for him; that he thus deterred others from bidding, and himself bought the property at a sacrifice; that subsequently he acknowledged to Cocks his trustee relation to the property, and expressed a willingness to surrender it, but that finally his cupidity got the better of his integrity and impelled him to deny that Cocks had any right whatever to the property, and that he claimed to hold it as his own.

The bill tenders back the purchase money paid Izard, with interest. Izard answered and denied all the material allegations of the bill. He also set up that he had mortgaged the property to Lewis; that it had been seized and sold under that mortgage; that Lewis became the purchaser. Izard's entire title thus becoming divested out of him and vested in Lewis.

The answer of Lewis sets up the same facts as to his title, and contains the same denials as to the averments of the bill. Hence the substitution of Lewis for Izard, as defendant in this case.

This outline is sufficient to render intelligible the several points, to which we shall advert in disposing of the case.

The question of the validity of the provisional court is not an open one. We have held it valid upon more than one occasion when the question has been before us. *The Grapeshot*, 9 Wall., 129 [76 U. S., XIX., 651].

The fraud charged upon Izard is expressly denied by his answer and is not sustained by the evidence. There is a decided preponderance against it. We are unanimous upon the point. It could serve no useful purpose to examine the proofs in detail in order to vindicate our judgment. Nothing further need be said upon the subject.

The remaining part of the case is that which relates to the allegations of the non-service of process.

In considering the bill, we must regard it as being just as it would be if it contained nothing but what relates to this subject. Everything else must be laid out of view. It must be borne in mind that the complainant is not in possession of the property.

If the bill alleged only the nullity of the judgment, under which the premises were sold, by reason of the non-service of the original process in the suit, wherefore the defendant had no day in court, and judgment was rendered against him by default, and upon those grounds had asked a court of equity to pronounce the sale void, and to take the possession of the property from Izard and give it to the complainant, could such a bill be sustained? Such is the case in hand. There is nothing further left of it, and there is nothing else before us. Viewed in this light, it seems to us to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain and adequate remedy at law, and the case is one peculiarly of the character where, for that reason, a court of equity will not interpose. This principle in the English equity jurisprudence is as old as the earliest period in its recorded history. Spence, Jur. of Cts. of Ch., 408, *note b*; Spence, Jur. of Cts. of Ch., 420, *note a*.

The provision on the subject in the 16th section of the Judiciary Act of 1789, 1 Stat. at L., 82, is merely declaratory and made no change in the pre-existing law.

To bare equitable relief, the legal remedy must be equally effectual with the equitable remedy, as to all the rights of the complainant. Where the remedy at law is not "as practical and efficient to the ends of justice and its prompt administration," the aid of equity may be invoked; but if, on the other hand, "it is plain, adequate and complete," it must be pursued. *Boyes v. Grundy*, 3 Pet., 215.

In the present case the objection was not made by demurrer, plea or answer, nor was it suggested by counsel; nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it and give it effect. *Hipp v. Babin*, 19 How., 278 [60 U. S., XV., 635]; *Parker v. Win. L. C. & W. Co.*, 2 Black, 545 [67 U. S., XVII., 333]; *Baker v. Biddle*, Bald., 416.

It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury. *Hipp v. Babin*, *supra*.

Where the complainant had recovered a judgment at law and execution had issued and been levied upon personal property, and the claimant, under a deed of trust, had replevied the property from the hands of the Marshal, and the judgment creditor filed his bill praying that the property might be sold for the satisfaction of his judgment, this court held that there was a plain remedy at law; that the Marshal might have sued in trespass, or have applied to the circuit court for an attachment, and that the bill must, therefore, be dismissed. *Knox v. Smith*, 4 How., 208.

In the present case the bill seeks to enforce "a merely legal title." An action of ejectment is an adequate remedy. The questions touching the service of the process can be better tried at law than in equity. If it be desired to have any rulings of the court below brought to this court for review, they can be better presented by bills of exception and a writ of error than by depositions and other testimony and an appeal in equity.

There is another important point, which we see 20 WALL.

have not overlooked. It is, whether the judgment of the provisional court can be pronounced a nullity without the legal representative of Anderson, the deceased plaintiff, being before the court as a party. As the first objection is a fatal one, we have not considered that question.

The decree of the Circuit Court is reversed and the case will be remanded, with directions to dismiss the bill.

Cited—110 U. S., 574; 4 Sawy., 287.

THE GRAND TOWER MINING, MANUFACTURING AND TRANSPORTATION COMPANY, Plff. in Err.,

v.

WALTER M. PHILLIPS AND DAVID L. ST. JOHN, Partners, as PHILLIPS & ST. JOHN.

(See S. C., 23 Wall., 471-480.)

Liquidated damages—actual damages—place of delivery—price at nearest market—measure of damages—letters, when not evidence.

1. Where a Company agreed to deliver to a firm a quantity of coal, in equal daily proportions, and agreed that if the Company failed to deliver any part of the coal to be delivered in any month, it should pay to the firm twenty-five cents per ton as liquidated damages for each ton which it failed to deliver, or instead thereof, such firm might elect to receive such coal in default in the next succeeding month, in which case it should be delivered in the next succeeding month; held, that the election given to the firm to receive, in the following month, the coal which they were entitled to receive and did not receive in a particular month, was as to that coal a substitute for the liquidated damages of twenty-five cents per ton, and with regard to that particular amount of coal the rule of liquidated damages was at an end.

2. Also held, that the agreement imposed upon the Company the obligation, if the plaintiffs so elected, to furnish the coal itself, instead of paying the liquidated sum, and if the Company did not furnish it, that such firm was entitled to recover the actual damages for the omission, and was not restricted to twenty-five cents per ton.

3. The price at the place of delivery is the standard by which to estimate the damage for non-delivery.

4. Where there was no market for coal at the place of delivery, except that of the defendant itself, the plaintiffs may show the price at the nearest available market where it could have been obtained.

5. The difference between such price and the price stipulated for by the contract, with the addition of the increased expense of transportation and hauling (if any), would be the true measure of damages.

6. The prices of coal at other places of distribution and sale cannot be adopted as a guide to the actual damage.

7. Letters of the President of the Company, containing his private instruction to, and correspondence with its local agent, showing the reasons which the Company had in not furnishing coal to the firm, were not admissible in evidence.

[No. 61.]

Argued Nov. 11, 1874. Decided Dec. 14, 1874.

[IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The facts of the case fully appear in the opinion of the court.

Messrs. B. R. Curtis, Thomas G. Allen, E. H. Owen and Wm. M. Evarts, for plaintiff in error:

I. The measure of damages can be none other

than the liquidated damages mentioned in the contract.

On this point we cite the following authorities:

Hudson Canal Co. v. Penna. Coal Co., 8 Wall., 284 (75 U. S., XIX., 351); *Sheets v. Sheldon*, 7 Wall., 422 (74 U. S., XIX., 168); *Partidge v. The Ins. Co.*, 15 Wall., 579 (83 U. S., XXI., 230); *Bealey v. Stuart*, 7 Hurl. & N., 753; *Whittle v. Frankland*, 2 Best & S., 49; *Pilkington v. Scott*, 15 M. & S., 657; *Rigby v. Great Western Railway Co.*, 14 M. & S., 811; *Asplin v. Austin*, 5 Q. B., 671; *Seddon v. Senate*, 13 East, 74; *Benson v. Dunn*, 23 L. T. (N. S.), 848; *Kerr v. Kuykendall*, 44 Miss., 137; *North Amer. Ins. Co. v. Throop*, 23 Mich., 146; *Lynde v. Thompson*, 2 Allen (Mass.), 456; *Hall v. Crowley*, 5 Allen, 804; *Brinkerhoff v. Olp*, 35 Barb., 27; *Brown v. Maulsby*, 17 Ind., 10; *Hise v. Foster*, 17 Ia., 28.

II. The recovery of probable or supposed profits, or other speculative damages, is not allowable in actions founded on breach of covenant or contract.

2 Para. Cont., 4th ed., p. 454, sec. 5; 2 Kent. Com., 9th ed., 649; 2 Greenl. Ev., 9th ed., secs. 256, 261; Sedg. Dam., 232, 260, 268, 273, 418, 450, and the cases referred to in notes to the text, in the books above cited, also to *The Amiable Nancy*, 3 Wheat., 546; *La Armistad de Rues*, 5 Wheat., 385; *Watson v. Ambegate, N. & Bos. R. R. Co.*, 3 Eng. L. & E., 497; *Hamlin v. Great N. Railway Co.*, 38 Eng. L. & E., 385; *Williams v. Reynolds*, 5 Am. Law Reg. (N. S.), 870; *Green v. Mann*, 11 Ill., 616; *Chicago & Rock I. R. R. Co. v. Ward*, 16 Ill., 527; *Olmstead v. Burke*, 25 Ill., 87; *Hiner v. Richter*, 51 Ill., 801; *Hayes v. Moynihan*, 52 Ill., 426; *Blydenburgh v. Welch*, 1 Bald., 339; *Milton v. Hudson River Steamboat Co.*, 37 N. Y., 214; *Pollitt v. Long*, 58 Barb., 20; *Hayden v. Cabot*, 17 Mass., 169; *Squire v. Western Union Telegraph Co.*, 98 Mass., 232; *Pittsburgh Coal Co. v. Foster*, 59 Pa., 365; *Douty v. Bird*, 60 Pa., 58; *Muldrow v. Norris*, 2 Cal., 74.

III. The measure of damages should be limited, in respect to the non-delivery of coal, to the difference between the contract price and the market price of the same description of coal at the time and place where, by the contract, the Company was required to deliver it.

We cite on this point, in addition to the authorities on the second point, applicable also to this, the following cases:

Worth v. Edmonds, 52 Barb., 42; *Wicker v. Hoppock*, 6 Wall., 99 (73 U. S., XVIII., 753); *Gillis v. Space*, 68 Barb., 177; *Hamilton v. McPherson*, 28 N. Y., 72; *Chandler v. Allison*, 10 Mich., 460; *Smith v. Dunlap*, 12 Ill., 192; *Phelps v. McGee*, 18 Ill., 158, 159; *Deere v. Lewis*, 51 Ill., 257; *Shepherd v. Hampton*, 3 Wheat., 200; *Hopkins v. Lee*, 6 Wheat., 109; *White v. Tompkins*, 52 Pa., 363; *Clark v. Pinney*, 7 Cow., 681; *Sargent v. Franklin Ins. Co.*, 8 Pick., 90; *Rose v. Bozeman*, 41 Ala., 678; *Bazin v. Steamship Co.*, 3 Wall., Jr., 229.

Messrs. Henry S. Green, D. T. Littler and William B. Gilbert, for defendant in error:

Upon a breach of such special contract, Phillips and St. John are entitled to recover all their damages, including gains prevented as well as losses sustained; not speculative profits, but profits that are reasonably certain.

Robinson v. Harman, 1 Exch., 332; *Hubb v. Bazendale*, 9 Exch., 341; *Watson v. Tourn*, 20 Eng. L. & E., 410; *Hamley v. Bunsell*, 31 Eng. L. & E., 308; *For v. Harding*, 7 Cosh., 516; *Masterton v. Mayor of Brooklyn*, 7 Hl. (N. Y.), 61; *Griffin v. Colver*, 16 N. Y., 49; *Heinemann v. Howard*, 59 N. Y., 27; *Hunter Coal Co. v. Buck, etc., Co.*, 57 Pa., 391; *Philadelphia, W. & B. R. R. Co. v. Howard*, 12 How., 330; Sedg. Dam., 3d ed., ch. 111, p. 72-77, and notes, and also p. 277, 2d ed.

It is a case of goods purchased for particular market and that known to both parties, and the damages must be measured by the market price at that market, and not at the place of delivery. See authorities above cited.

Also, *Bridge v. Wain*, 1 Stark., 504; *More v. N. Y. Shot & Lead Co.*, 49 N. Y., 422; *Bell v. Cunningham*, 3 Pet., 84; *O'Connor v. Forster*, 10 Watts, 418; *Hargous v. Allen*, 5 Hill, 474; Sedg. Dam., 2d ed., 277.

In the absence of clear and explicit evidence of market value at place of delivery, evidence of market value at other places where there is a market, and especially places where the article is usually sold, with cost of transportation thither, is admissible to establish and, if there is no market at place of delivery, does establish the market value at the place of delivery.

Berry v. Dwinel, 44 Me., 255; *Williamson v. Dillon*, 1 Har. & G. (Md.), 444; *Farling v. Polleys*, 30 Me., 491; *Stevens v. Lyford*, 7 N. H., 361; *Dabovich v. Emeric*, 12 Cal., 171; Sedg. Dam., 3d ed., ch. X., p. 274, n. 1; see, also, *Bevans v. U. S.*, 18 Wall., 57 (80 U. S., XX., 531); *Improvement Co. v. Munson*, 14 Wall., 442 (81 U. S., XX., 870).

Mr. Justice Bradley delivered the opinion of the court:

This action was brought in the court below by Phillips and St. John, to recover damages for breach of contract. The declaration sets forth that the Grand Tower Mining, Manufacturing and Transportation Company, on the 15th of December, 1869, entered into a written contract with the plaintiffs, to deliver to them at the Company's coal dump at Grand Tower on the Mississippi River, on board barges or other vessels to be provided by the plaintiffs, 150,000 tons of screened, merchantable lump and nut coal of the product of the Company's mines in Jackson County, Illinois, yearly during each of the years 1870, 1871 and 1872, in equal daily proportions as near as might be, between the 15th of February and the 15th of December in each of said years. The Company also leased certain boats to the plaintiffs. It was provided by the agreement that Phillips and St. John should have the sale of all coal produced by said mines which should be sold at and below Cairo, and that they should not sell any coal north of Cairo. The price to be paid for the coal for the first year was \$3 per ton for lump, and \$1.50 for nut, with a rebate of twenty-five cents on certain conditions—settlements to be made monthly, in cash or four months paper. The price for the other years was to be graduated by the proportionate expense of mining. Phillips and St. John agreed, if not prevented by ice or low water, to furnish barges or suitable vessels sufficient to receive the said coal in equal daily proportions, which

barges and vessels the Company agreed to load without unnecessary delay. It was provided by the 8th article of the agreement, as follows, that is to say:

Ninth. It is further mutually covenanted and agreed that if, for any other than the unavoidable causes heretofore mentioned, and through no fault of the parties of the second part, the party of the first part shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay to the parties of the second part, as liquidated damages, twenty-five cents for each and every ton which it may have so failed to deliver, or instead thereof, the parties of the second part may elect to receive all or any part of the coal so in default in the next succeeding month, in which case the quota which the party of the first would otherwise have been bound to deliver under this contract shall be increased in such succeeding month to the extent of the quantity in default. And further, if through no fault of the parties of the second part nor in consequence of the unavoidable causes heretofore mentioned, the parties of the first part shall fail to deliver its monthly quota of coal as herein provided in regular daily quantities, the party of the first part shall pay to the parties of the second part \$50 as liquidated damages for each and every day that the steam tow boats of the party of the second part may be detained in consequence of such failure, and it is further mutually covenanted and agreed, that if either of the parties of the second part shall fail in any month to furnish barges or other suitable vessels to receive in regular daily quantities the quota which they are bound under this contract to receive, and if through such failure the party of the first part is prevented from delivering at least one half of the monthly quota stipulated for herein, the parties of the second part shall, for each and every ton less than one half of said quota which, through such fault of the parties of the second part the party of the first part is unable to deliver, pay to the party of the first part the sum of twenty five cents as liquidated damages, and it is further mutually covenanted and agreed, that if the party of the second part shall in any month fail to make payments for coal received and the use of barges and other property leased from the party of the first part sold, worn out or destroyed, or fail to pay maturing obligations as provided herein—the party of the first part shall be released from any obligation to make further deliveries of coal, and it is further mutually covenanted

for said month, amounting to 10,000 tons in the next succeeding month, and so notified the defendant; but that the defendant also, without any excuse, failed to deliver the quota in November, 1870, or the quota due for the said month of November or any part thereof, amounting in all to 30,000 tons, which they thus failed to deliver, and that the defendant has never delivered the same. Damages are assigned for loss of profit (the price of coal below Cairo that fail being, as alleged, \$60 per ton) and for the expense of keeping their barges and tow boats ready to receive coal at Grand Tower.

Other counts were afterwards added, alleging a like election by the plaintiffs to take the quota for November during the following month of December, and the quotas for both October and November during the said month of December, and the failure to furnish the said quotas amounting in all to 30,000 tons, with branches as before.

To the original declaration the defendant pleaded:

1. That the plaintiffs did not regularly furnish barges to receive the said quotas of coal as required by the agreement.

2. That the plaintiffs did not perform all things required of them by the agreement.

3. That the plaintiffs, on the first of November, 1870, had not paid for the coal already received, nor for the use of the barges leased from the Company, nor for the damages to barges, and had not paid all maturing obligations as required by the agreement.

4. That the plaintiffs failed to furnish barges to receive coal in the months of July, August and September, 1870, so that the defendant was prevented from delivering a large portion, more than half of the respective quotas for those months; and that the plaintiffs were indebted to the defendants for liquidated damages on this account in October and November in a large amount, exceeding \$6,000, and that, therefore, the defendant was released from all obligation to furnish coal during those months.

5. That the plaintiffs not only elected to receive the October quota in November, as part of the quota of the latter month, but afterwards elected to receive the entire quota of November in the month of December, and thereby waived all claim to damages.

To the additional counts of the amended declaration the defendant filed pleas similar to the second and third pleas above stated; and also thirdly, that after the commencement of the suit, the plaintiffs elected to take in January, 1871, the quotas of coal which they had before elected to receive in December, and that the defendant was ready and willing to deliver the same, but the plaintiffs did not furnish barges to receive it, and did not pay for said coal. To these pleas the plaintiffs demurred, and the court, properly, we think, sustained the demurrer to all the pleas except the first, upon which the parties went to trial.

The issues to be tried, therefore, were simply whether the plaintiffs had failed to furnish barges to receive the quotas of coal due in October and November, and what damages the plaintiffs sustained by the failure of the defendant to furnish the coal.

The question of damages was really the prin-

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principal question in the cause. The defendant insisted that, by the agreement, the damages were liquidated at twenty-five cents per ton for all the coal which it failed to deliver in accordance with the agreement. The plaintiffs, on the contrary, contended that they had the option, either to take the liquidated damage accruing on each month's deficiency, or to insist on having the coal itself delivered to them in the following month; and that when such election was made, the refusal by the defendant to deliver the coal, entitled the plaintiffs to the actual damage which they sustained by its non-delivery. The defendants conceded that the plaintiffs had the option referred to, but insisted that the plaintiffs, by electing to receive the deficient coal in the following months, merely postponed the time of its delivery and increased the quota of the said following month, which thereupon became subject, if not furnished, to the same rule of liquidated damages as before. If twenty-five cents per ton was all that the defendant was liable for, the damages would have amounted to only \$7,500 for the quotas of October and November. If the exercise, by the plaintiffs, of their option to have the coal itself, entitled them to the actual damage which they sustained by its non-delivery, it is evident that their damages might be much more than the sum mentioned. The court took the plaintiff's view of the subject and so instructed the jury, who found damages to the amount of \$200,000, or nearly \$7 per ton for the alleged deficit of thirty thousand tons.

The question depends upon the true construction of the agreement, and we are of opinion that the view taken by the court below on this point was correct. It is evident, from an inspection of the contract, that the election given to the plaintiffs to receive in the following month the coal which they were entitled to receive and did not receive in a particular month, was a substitute for the liquidated damages of twenty-five cents per ton. With regard to that particular amount of coal the rule of liquidated damages was at an end. The agreement did not carry it forward to the following month. It imposed upon the defendant the obligation, if the plaintiffs so elected, to furnish the coal itself instead of paying the liquidated sum. If not so, what was the option worth? It amounted to nothing more than the right of giving to the defendant another month to furnish the coal. Surely they would have had that right without stipulating for it in this solemn way. Had not this option been given to the plaintiffs the defendant would have had the option either to furnish the coal or to pay the twenty-five cents per ton for not furnishing it—a sum which they could very well afford to pay upon a slight rise in the market prices. It was evidently the very purpose of the option given to the plaintiffs to avoid this oppressive result. They could require the coal to be furnished at all events, and if they elected to do this, it was the duty of the defendant to furnish it. The contrary construction would make the stipulation worse than useless. The plaintiffs might continue to exercise their election to receive the coal, month after month, without avail, and, at the end, find themselves exactly at the point they started

from—forced to accept the twenty-five cents per ton.

The law affords many analogies in accordance with the views we have taken. Thus, by the common law, a gift of property to several in common, and when either of them dies a gift of his share to the survivors, does not subject that share to further survivorship unless it is so expressly provided. So, a condition not to underlet without license does not extend to a sub-tenant. Instances of this kind might be multiplied at will.

But whilst we concur with the court below on this point, which is the most important point in the cause, there are certain assignments of error which seem to be well taken and will require a reversal of the judgment. These relate to the admission of evidence which may have affected, and probably did seriously affect, the amount of the verdict.

The court having decided that the plaintiffs were entitled to the actual damages sustained by them by the non-delivery of the quotas of coal for October and November, 1870, the next inquiry was as to the rule by which those damages were to be ascertained. On this point the plaintiffs were allowed to show the prices of coal during November and December, 1870, at all points on the Mississippi River, below Cairo, even to New Orleans. And the court charged the jury against the exceptions of the defendant, that the true measure of damages was the cash value during those months of the kind of coal mentioned in the contract, at Cairo, or points below it on the Mississippi River, after deducting the contract price of the coal and the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation. Now, although it is probable that the plaintiffs could have got the prices which the evidence showed were obtained for coal at and below Cairo, had their coal been furnished according to the agreement, yet the rule of law does not allow so wide a range of inquiry, but regards the price at the place of delivery as the normal standard by which to estimate the damage for non-delivery. It is alleged by the plaintiffs that this rule would have been a futile one in their case, because no market for the purchase of coal existed at Grand Tower, except that of the defendant itself, which, by the very hypothesis of the action, refused to deliver coal to the plaintiffs, and which had the whole subject in its own control. This is certainly a very forcible answer to the proposition to make the price of coal at Grand Tower the only criterion. It is apparent that the plaintiffs would be obliged to resort to some other source of supply in order to obtain the coal which the defendant ought to have furnished them. And it would not be fair, under the circumstances of the case, to confine them to the prices at which the defendant chose to sell the coal to other persons. The true rule would seem to be, to allow the plaintiffs to show the price they would have had to pay for coal in the quantities which they were entitled to receive it under the contract, at the nearest available market where it could have been obtained. The difference between such price and the price stipulated for by their contract, with the addition of the increased ex-

pense of transportation and hauling (if any), would be the true measure of damages. To this is properly to be added the claim (if any) for keeping boats and barges ready at Grand Tower for the receipt of coal.

But the prices of coal at New Orleans, at Natchez, and other places of distribution and sale, although they might afford a basis for estimating the profits which the plaintiffs might have made had the coal stipulated for been delivered to them, cannot be adopted as a guide to the actual damage sustained so long as any more direct method is within reach.

Another point in which the court erred in the course of the trial, was in the admission of the letters of George T. Oliphant, the President of the defendant, containing his private instructions to and correspondence with the local agent at Grand Tower. This evidence was clearly inadmissible under the issue, and should have been excluded. The particular reasons or motives which the Company or its officers may have had in not furnishing coal to the plaintiffs were not in issue.

It is unnecessary to advert to the other points made by the plaintiffs in error.

The judgment must be reversed, and a venire de novo awarded.

THOMAS GREEN, JAMES GREEN, GEO.
W. WELLS AND WILLIAM A. WARD,
Appls.,

v.

CATHARINE GREEN, MARY CATHARINE GREEN AND ALICE GREEN.

(See 8. C., 23 Wall., 486-492.)

Rule in Shelley's case, when not applicable—construction of trust deed—trust estate.

1. The rule in *Shelley's case* is applicable to trust estates, where both the life estate and the remainder are of the same character, but not where the life estate is of an equitable character and the remainder is a legal estate, or *vice versa*.

2. Where one conveyed real estate to a trustee in trust for the separate use of his wife and his children during her life, in absolute right as if she was a *feme sole*, and free from any right or control of her husband, and in trust to convey said premises in such manner and to such purposes as said wife by her will may direct, and in the absence of such direction, after her death, to her heirs at law; held, that the deed did not create an estate in fee simple in the wife.

3. It created but an equitable life estate in her, and in the absence of a direction by her will, it executed the legal estate in her heirs. The rule in *Shelley's case* held not to be applicable.

[No. 95.]

Submitted Dec. 3, 1874. Decided Dec. 14, 1874.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. Lewis S. Wells and W. B. Webb, for appellants:

The rule in *Shelley's case* is uniformly recognized in Maryland and the District of Columbia.

The legal fee is conveyed to the trustee. It is given to him and his heirs and comprehends the whole estate. The deed being by bargain and sale, confers upon him the entire legal estate which exhausts the entire estate and

See 23 WALL.

makes the other limitations created thereby, the one to the wife for life, and the remainder to her heirs at law, both equitable estates.

Crocoll v. Shererd, 5 Wall., 281 (72 U. S., XVIII., 577); *Matthews v. Ward*, 10 Gill & J., 448; *Neilson v. Lagow*, 12 How., 98.

In the following cases, in which trusts were limited similar to those in the present case, it was held that the wife took the equitable estate in fee simple:

Tillinghast v. Coggeshall, 7 R. I., 388; *Armstrong v. Lane*, 12 Ohio, 878; *McWhorter v. Agnew*, 6 Paige, 111.

But even if the life estate was vested in the wife and children jointly, the remainder being to the heirs at law of the wife, the rule in *Shelley's case* would, nevertheless, apply.

2 Greenl. Cruise, 386.

The trustee has no active duties to perform in regard to the life estate; and, apart from what would seem to have been the intention of the grantor, and the legal effect of the nature of the conveyance, there would seem to be no necessity that the legal estate should vest in him.

If there is no separate use in the wife, his intervention would not be necessary to protect her against the marital rights of her husband and, in point of fact, the husband has by the terms of the deed divested himself of all his marital rights.

The wife's estate might, therefore, be considered an executed one, and there is express authority to this point, even in cases where the life estate was limited to the separate use of the wife.

See, *Williams v. Waters*, 14 Mees. & W., 166; *Douglas v. Congreve*, 1 Beav., 59, and *South v. Alleine*, 1 Salk., 228.

The rule in *Shelley's case* applies as well to equitable as to the legal estates in the case of executed trusts.

2 Washb. Real Prop., 455; *Crocoll v. Shererd*, 5 Wall., 281 (72 U. S., XVIII., 577); *Wms. Real Prop.*, 186; *Tud. L. Cas.*, R. P., 508.

Where both estates are legal, the fact that a trust is attached to one of them will not prevent the rule from applying.

2 Washb. Real Prop., 257; *Tud. L. Cas.*, R. P., 484; *Douglas v. Congreve*, 1 Beav., 59; *S. U.*, 4 Bing., N. C., 1.

Mr. Walter S. Cox, for appellees:

The deed from Thomas to James Green gave to Mrs. Catharine Green merely an equitable life estate.

Where property is conveyed to a trustee for the separate use of a married woman, the legal estate is not vested in her by the Statute of Uses, but her estate remains equitable. Were it otherwise, and were the legal estate vested in her, her husband would have the legal right to collect the rents and profits.

See, *Clancy, Husband & W.*, 256; *Ware v. Richardson*, 8 Md., 505; *Fearne, Remainders*, 52.

The limitation to the heirs of Catharine Green, on the other hand, gives them a legal estate, as no active duty is devolved on the trustee with regard to them, which requires the legal estate to remain in him.

Where the particular estate is equitable and the remainder to heirs is legal, or *vice versa*, the two estates do not unite and become a fee simple in the tenant for life. *Fearne, Remainders*, p. 52, ch. 1, sec. 5, par. 9, *et. seq.*

Having a life estate only, with a power to appoint by will, could not direct a conveyance in fee simple.

Story, 2 Eq. Jur., sec. 1898; *Reid v. Shergold*, 10 Ves., 370; 2 Roper, Husband & W., ch. 20; *Calhoun v. Calhoun*, 2 Strob. Eq., 231; 1 Story, Eq. Jur., sec. 173; Co. Litt., tit. 32, ch. 24, secs. 15, 43.

Mr. Justice Hunt delivered the opinion of the court:

Thomas Green, by deed dated January 15, 1867, conveyed certain real estate in Georgetown, D. C., to James Green, in fee, in trust, "For the sole and separate use of Catharine Green (wife of Thomas), and for the children of said Thomas Green and Catharine Green, during her life in absolute right and property as if she was a *feme sole* and free and clear of any right, title and estate, whether as tenants by the curtesy or otherwise of her present or any future husband, and from his control, and from any liability for his debts, and upon trust to hold and dispose of and convey the said premises in such manner and to such uses, interest and purposes as she, the said Catharine Green, may, from time to time, direct by any testament under, or as may be directed by any last will and testament, or other testamentary writing of what form soever, which she, the said Catharine Green, notwithstanding her present or any future coverture, shall and may direct, limit and appoint; and in the absence of any such direction, limitation or appointment, or subject thereto, or remainder after her death to her heirs at law of the said Catharine Green." Record, pp. 2, 3.

On the 21st day of November, 1868, James Green, as trustee, and Thomas Green and Catharine Green united in a deed to William A. Ward, whereby they conveyed to him in fee simple the premises described in the deed first set forth in trust to secure the payment of a note for \$6,000, payable six months from date with interest, and bearing even date with the deed payable to the order of Lewis S. Wells.

This note having matured and continuing unpaid, the trustee, at the request of Wells, advertised the premises for sale, and was proceeding to a sale thereof under the power contained in the deed of trust to Ward.

The complainants file this bill, alleging that the latter deed of trust is void; that the powers contained in it are unauthorized by the first deed of trust; that the title obtained under it would impair the equitable title of the said Catharine Green under the deed for her benefit, and asking that the last deed of trust may be set aside, and that an injunction may issue restraining Ward from selling, under the alleged authority of the deed to him.

Among other things, the complainants allege that under the trust deed first set forth, Catharine Green had no power to appoint or limit the fee simple of the premises therein described by deed, but by a last will and testament or testamentary writing only.

If there be given a power to dispose of property by will or by writing in the nature of a will, such power cannot be executed by a deed because a deed is irrevocable and works an immediate destruction of the power.

1 Story, Eq. Jur., sec. 173; *Reid v. Shergold*, 10 Ves., 370; 2 Roper, Husband & W., 20.

This proposition does not appear to be controverted. The contention is as to the effect of the trust for Mrs. Green in the first deed described. It is contended that, under the rule in *Shelley's* case, she became by that conveyance the owner of the property in fee simple. It is said that the estate granted to her for life, and the remainder to her heirs at law, being both equitable estates, united in her as an estate of inheritance, and without reference to the exercise of the power of appointment; that, being the owner of the fee, her deed to Ward carries the full title to him. It is upon this chain of title that the plaintiff in error rests his case.

The court below adjudged and decreed that the provisional injunction granted by the special Term be made perpetual, and that the defendant, Ward, be absolutely enjoined and prohibited from selling or attempting to sell the property described in the trust deed, except the life estate of Catharine Green in one third thereof, and that the defendants below pay the costs of the suit.

From this decree the defendants appealed to this court.

In *Shelley's* case, 1 Coke, Rep., 88-219, the rule is thus laid down: "That when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, the heirs are words of limitation of the estate and not words of purchase."

Mr. Preston uses the following language, which is approved by Chancellor Kent: "When a person takes an estate of freehold legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 1 Prest. Est., 263; 4 Kent, Com., 215.

The trust deed to Thomas Green of January 15, 1867, creates the following trust, to which the premises are subjected:

1. To the use of Catharine Green and the children of Thomas Green and herself during the life of Catharine Green. There are two such children. Catharine and her two children are, therefore, joint tenants, or tenants in common of the estate during the life of Catharine. The words, "as if she were *feme sole*," "free and clear of any right or control of her present or future husband," do not define the estate, but have the effect simply to exclude any possible claim on the part of her husband or his creditors.

2. To such uses and purposes as the said Catharine may, by testamentary writing, limit and appoint.

3. In the absence of such limitation, or subject thereto, or remainder after her death, to the heirs at law of the said Catharine.

It is contended that these trusts create an estate in fee simple in Catharine Green, which, by her deed to Mr. Ward, has become vested in him.

The rule in *Shelley's* case is applicable to trust

estates where both the life estate and the remainder are of the same character. The legal effect of the union of the estates, as declared by that rule, does not occur where the life estate is of an equitable character and the remainder is a legal estate or *vice versa*. Both estates must be of the same character. Fearne, Rem., 62; *Ware v. Richardson*, 3 Md., 505. The Court of Chancery does not, however, consider itself tied up to an implicit observance of the rule in respect to limitations which do not immediately vest the legal estate. Fearne, Rem., 3d ed., p. 61.

A distinction is also given by Mr. Fearne to the effect that a trust or use created by deed will often be held to create an estate in the heirs named which cannot be cut off by the act of the tenant for life, when the same effect would not be given to an estate created by like language in a devise. The reason given, viz.: that in the former case there may often occur a valuable consideration in the intention to make provision for the issue of an intended marriage, does not exist when the transaction arises after marriage, but still the rule is to some extent a rule of property. Fearne, Rem., 78-81.

Mr. Cruise, however, says that the same mode of construction is adopted in case of deeds as in case of devises (1 Cruise, Dig. R. Prop., 459); and so is the case of *Ayer v. Ayer*, 16 Pick., 330, in Massachusetts.

After commenting on various authorities on this subject, Mr. Fearne adds: "This brings us to those cases of limitations in trust, in decreeing the execution of which the Court of Chancery so far departs from that which would be the legal operation of the words limiting the trust, if reduced to a common law conveyance, as to construe the words 'heirs of the body of the cestui que trust,' although preceded by a limitation for life, as words of purchase and not of limitation." Such was the case of *Papillon v. Voice*, 2 P. Wms., 471, where A devised a sum of money to trustees, in trust, to be laid out in lands and to be settled on B for life, remainder to trustees during the life of B, to support contingent remainders, remainder to the heirs of the body of B, remainder over with power to B to make a jointure. It was decreed that B should have but an estate for life in the lands so to be purchased, and Lord Chancellor King declared that the diversity was between the will passing a legal estate and leaving the estate executory, so that the party must come into the Court of Chancery in order to have the benefit of the will, that in the latter case the intention should take place and not the strict rules of law. *Papillon v. Voice* [supra].

The case of *Bagshaw v. Spencer*, 1 Ves., 142 (3 Atk., 246, 570, 577), is quite instructive in its resemblance in some of its facts to the present case, and in the principle finally announced by Lord Hardwicke, viz.: that there is a distinction between a trust in equity and a mere legal estate, and that in the latter class the words must be taken as they stand according to their legal determination, while a different rule prevailed in regard to trusts. Fearne, 88.

Trusts are the mere creatures of confidence between party and party, totally distinct in almost every quality from those legal estates which are the subjects of tenure. They are in their nature independent of tenure and, there-

fore, not the object of those laws which are founded in the nature of tenure. They are rights arising solely out of the intent of the party who created them and, therefore, such intent could be the only guide in the execution of them. Fearne, 89.

Ware v. Richardson, 3 Md., 505, is a case like the one before us, governed by the laws of Maryland, and strikingly akin to it in its main facts. In that case Mrs. Kennedy, "In consideration of the natural love and affection which she hath and beareth towards Elizabeth Richardson, and in consideration of five shillings to her paid by Samuel N. Ridgely, did grant, bargain, sell, enfeoff and convey to the said Samuel, his heirs and assigns," certain property described, to have and to hold in trust, first, that Mrs. Kennedy should enjoy the same during her own life, and after her decease, upon the further trust, that Elizabeth Richardson, during her natural life, should hold and enjoy the same, the rents, issues and profits thereof, the same to convert to her own proper use and benefit, as if she were *feme sole*, without let or interference from her husband or liability for his debts; "and from and immediately after the death of the said Elizabeth, then to, and for the use and benefit of the legal heirs and representatives of the said Elizabeth, and to and for no other intent and purpose."

As in the present case, it was there contended that, by the rule in *Shelley's* case, Elizabeth Richardson took a fee, and that the estate was liable for her debts. The point was elaborately argued by Mr. William H. Norris in support of this contention, and Mr. Thomas S. Alexander in opposition thereto, before the Court of Appeals of Maryland. That court held (*Mr. Justice Mason* delivering its opinion) that this deed created but an equitable life estate in Mrs. Richardson, and that it executed the legal estate in the heirs; that where the estate limited to the ancestor is an equitable or trust estate, and the estate limited to the heirs is an executed use or a legal estate, the two will not coalesce in the ancestor. The rule in *Shelley's* case was held not to be applicable, and the estate was adjudged to have passed upon her death to her children, Charles and Robert.

The cases of *Doe v. Considine*, 6 Wall., 458 [73 U. S., XVIII., 869], *Coxall v. Shererd*, 5 Wall., 268 [72 U. S., XVIII., 572], and of *Daniel v. Whartenby*, 17 Wall., 639 [84 U. S., XXI., 661], also bear upon the question before us.

In the last case the question arose under a devise "To Richard Tibbitt during his natural life, and after his death to his issue, by him lawfully begotten of his body, to such issue, their heirs and assigns forever," with limitations over. It was held that the rule in *Shelley's* case did not govern, and that Richard took a life estate only. It is not as pointed in its authority as the case of *Ware v. Richardson*, for the reason: 1, that the question arose upon a will and not upon a deed; 2, that the limitation was not to Richard's heirs simply, but to a class equivalent to the children of Richard.

To adjudge that the deed of January 15, 1867, transferred and conveyed this property in fee to Mrs. Green, so that by the common law her husband would have had as tenant by curtesy an immediate and continuing right to the en-

joyment of the rents and profits during his life, and so that her two children would have in it no estate, legal or equitable, would be in manifest violation of the intention of the parties to that deed. A rule of the law of tenure, which would require us so to hold, would work a monstrous perversion of justice. We are satisfied that there is no such rule, and that a compliance with the evident intention of the parties is in accordance with the rules of law.

The decree is affirmed.

UNITED STATES, *Appt.*,

v.

WILLIAM SHREWSBURY.

(See S. C., 23 Wall., 508-518.)

Contractor, when estopped from further claim.

Where a person agreed to transport government stores into the Territories of Colorado and New Mexico, and the agreement provided that a Board of Survey be called at the place of delivery to examine the quantity and condition of the stores transported; and in case of loss or deficiency, such Board should assess the amount thereof and state whether it was attributable to the neglect of the contractor, and that the decision of such Board should determine the payments to be made to the contractor; and on transporting a certain quantity of stores such Board reported a deficiency to be charged to the contractor, and he accepted their decision and gave a receipt in full for his account, giving notice at time of payment that he should claim a re-adjustment and full payment, he must be held to have waived any exception which he might have taken at the proper time, and to have been, when the payments were made, finally concluded from further claim.

[No. 535.]

Submitted Dec. 4, 1874. Decided Dec. 21, 1874.

A PPEAL from the Court of Claims.

The claimant and Colonel Potter, a Quartermaster, United States Army, Mar. 27, 1865, entered into a written contract, by which the claimant agreed to transport supplies to certain United States forts and posts. Large quantities of government stores were delivered to claimant at Fort Leavenworth for transportation to Forts Lyon and Union, and on the arrival of the trains at their destination, were turned over to the United States quartermaster in charge. Boards of Survey, which were ordered in conformity to article VIII. of the contract, met and examined in each case, the stores delivered. Article VIII. of the contract provided that "In all cases where stores have been transported by the said William S. Shrewsbury, under this agreement, a Board of Survey shall be called without delay, upon their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported; and in cases of loss, deficiency or damage, to investigate the facts and report the apparent causes, assess the amount of loss or injury, and state whether it was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control; and these proceedings, a copy of which shall be furnished to the contractor, shall be attached to the bill of lading, and shall conclude the payments to be made on it, for loss of weight, due to shrinkage, or for leakage of vinegar or molasses, or other

liquida. The contractor shall not be liable if the packages are delivered in good order and condition, and the Board of Survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of the contractor or his agents. For deficiencies or damages, the contractor shall pay the costs at the point he receives the articles; all freight shall be deducted in the latter case in proportion to the amount of damages assessed. Should no Board of Survey be called, through failure on the part of the Quartermaster's Department or other military authority to convene one, it shall be considered that the contractor has delivered all the stores, as specified in the bill of lading, in good order and condition, and he shall be paid accordingly. If the amount of loss, deficiency or damage exceeds the value of the bill of lading, it shall be deducted from any after payments that may become due. Transportation to be paid in all cases, according to the actual distance traveled from the place of departure to that of delivery, the distance to be indorsed on the bill of lading by the officer or agent receiving the supply."

In the case of claimant's train No. 5, the proceedings of the Board of Survey, as reported to the commanding officer and attached to the bill of lading, are set forth in the opinion of the court.

In pursuance of the foregoing recommendation, the claimant was charged by the Quartermaster's Department with the loss of nine sacks of corn (which weighed 1,089 pounds), and in addition to the nine sacks of corn, with the 3,171 pounds of difference in weight of the remainder of the corn before mentioned, making in all 4,240 pounds deducted, and for this difference \$449.61 was deducted from his account. The claimant has never been paid this balance. A general account was stated between the parties, showing the amount allowed and deducted, entitled:

"An account for the transportation of military stores from Fort Leavenworth, Kansas, to Fort Riley, Kansas, on route No. 2, under contract with the United States, dated March 27, 1865, as per the accompanying bills of lading, receipts and proceedings of Boards of Survey, to wit:"

The claimant was paid the total of the amounts allowed, and at the foot he gave the receipt, a copy of which is set forth in the opinion of the court.

At the time of receiving payment he protested against the deduction, and notified the quartermaster who made the payment, that he should look to the defendant for a corrected adjustment and full payment.

The Boards of Survey followed the same course in the other trains, and their proceedings were similar to those above cited. It does not appear that any allegation was made at any time, by the claimant or his agent that the proceedings did not conform to the contract, or that any objection was made in any shape to the proceedings; and the protest, found by the court to have been made by the claimant was to the deductions *per se*, not to the proceedings of the Board.

The Court of Claims having given judgment in favor of the claimant, the defendant took an appeal to this court.

Messrs. Geo. H. Williams, Atty-Gen., and

John Goforth, Asst. Atty-Gen., for appellant:

1. The reports of the Board of Survey contained everything made necessary by the 8th article of the contract. The condition of the stores was reported, the deficiency in weight noted, and the liability of the contractor for damages and deficiencies, contained in the recommendations of the Board. These are all that the contract contemplated, and the exact form of report was left to the judgment of the Board.

2. If there were any informalities in the reports of the Boards of Survey, the claimant waived them by acquiescence in the conclusions of the reports, and acceptance of payment on the vouchers or bills of lading, which included the deductions ordered by the Boards as in full of all services of the various trains against which the Boards had charged deficiencies. The agreement was to submit the questions of condition and quantity of the stores transported by the claimant, to Boards of Survey, and their reports were to be conclusive as to the payments to be made on the bills of lading or vouchers. Boards were ordered, and they met and examined the transported stores, and their proceedings were attached to the bills of lading. No protest or objection was made to the composition, the proceedings or reports of the Boards; nor any charge made, of informality in the proceedings or reports. The claimant accepted the conclusions of the Boards as in full payment of all services rendered, and then protested against the deductions made by the Boards. The Boards were in the nature of arbitrators, acting for both parties.

McLean, 248, 258.

Where there is a submission to arbitration, after a ratification of an award and execution of its requirements, it is too late for the party to set up any defect in the proceedings or in the award. In the case of *Hoogs v. Morae*, 81 Cal., 128, the court says:

"The action of the plaintiff in taking a judgment on the award, and then receiving the amount of the judgment in satisfaction, was a waiver of any errors or misconduct on the part of the arbitrators, of which he had notice at the time, and he is charged with notice of all errors or misconduct which are known to his attorney. Under the circumstances of the case, we are at a loss to perceive how there could be any valid ground for setting aside the award at the instance of the plaintiff, except for fraud discovered after the plaintiff had accepted payment in full of the judgment."

And in *Tudor v. Scovell*, 20 N. H., 174, it is said:

"But, in general, a party may waive a condition for which he has stipulated, and that principle seems applicable to the present case. Whatever advantages the parties might have contemplated in requiring the award to be made in writing, they were competent to waive that condition as to the whole or a part of the matter included in it."

If the proceedings were informal, the claimant had the option to accept or not any money under them; but after he waived or cured the informality by acceptance of the terms of the report, that acceptance was in conformity to the 8th article of the contract, which says: "The proceedings shall conclude the payments to be

made on the bill of lading," and the contractor cannot now claim that the payments shall not be final, or be in full, or conclude him. No verbal protest could disturb the finality of the claimant's uncontrolled, deliberate action in accepting the amount awarded.

A proper objection or protest to the reports of the Boards of Survey would have been a refusal to receive the amount under the terms of the report; not, most certainly, a written receipt, as in full of all services rendered by certain trains, even if accompanied by a verbal protest. A verbal protest to the reports or proceedings of the Boards cannot be considered to have any effect when there is an acquiescence in the conclusions of the Boards by an acceptance of the amount of the bills of lading, made in conformity to the reports, which the contract declared should conclude the payments. He could not have accepted the award without being concluded.

Boards of Survey having been called, payments could not, under the contract, be made except upon the certificates given, and upon which payment was made. Hence, he received payment which, under the law, was necessarily conclusive.

Worsley v. Wood, 6 T. R., 710; *Dawson v. Muir*, 3 Doug., 28; *Milner v. Field*, 5 Exch., 829; *Morgan v. Birnie*, 9 Bing., 672.

The taking of the amount allowed by the Boards of Survey appointed pursuant to the contract, i. e., by the act of both parties, and giving the receipt as in full payment for all services rendered by certain trains, bring the case within the ruling of the Supreme Court in *U. S. v. Justice*, 14 Wall., 535 (81 U. S., XX., 753); *Mason v. U. S.*, 17 Wall., 67 (84 U. S., XXI., 564); and *Sweeney v. U. S.*, 17 Wall., 75 (84 U. S., XXI., 575); notwithstanding a promise on the part of the claimant to look elsewhere for the amount of deduction. In fact, this case is more favorable for the United States than those quoted, for the reasons stated in point 2, viz.: because it is an acceptance of an award which the contract says shall conclude all payments on the bills of lading.

Mr. Charles F. Peck, for appellee:

It was optional with the Government whether a Board of Survey should be called in any case. If none should be called, it was to be considered that no deficiency existed, and full payment should be made.

The Board of Survey was to be called by the Government; its proceedings were to be all for the benefit of the defendant; its action and proceedings were *ex parte*, and it was composed entirely of government officers.

It is unnecessary to regard this stipulation concerning the Board of Survey as in all respects amounting to an arbitration. It is sufficient to say that it was analogous to such a proceeding, and is to be governed by the same principles, so far as they are applicable.

The contractor consented that the officers constituting the Board of Survey might, for the purpose of ascertaining whether he had done his duty, do certain things, viz.:

1. Examine the quantity and condition of the stores transported; and in cases of loss, deficiency, or damage,
2. Investigate the facts.
3. Report the apparent causes.

4. Assess the amount of loss or injury.

5. State whether it was attributable to neglect or want of care on the part of the contractor, or to causes beyond his control.

These five points he agreed might be passed upon by the Board; nothing more and nothing less.

The court below, whose conclusions of fact cannot be appealed from, says:

"The Board did not investigate the facts; it did not report the apparent causes; it did not state whether the loss was attributed to neglect or the want of care on the part of the contractor, or to causes beyond his control."

The contract says these proceedings shall conclude the payments to be made, and I submit that these proceedings are necessary for that purpose.

Wats. Arb., 145; Russ. Arb., 3d ed., 235.

"If the submission contain instructions concerning the form, execution or publication of the award, they must be strictly followed."

Morse, Arb., 259.

"An award owes its force and validity to the agreement of the parties, and is not, of course, binding upon them, unless it has been made in the manner which the agreement has pointed out."

Tudor v. Scovell, 20 N. H., 174; *Montague v. Smith*, 18 Mass., 396; *Allen v. Galpin*, 9 Barb., 246.

It is further alleged by the appellant, that if there were any informalities in the reports of the Board of Survey, the claimant waived them by acquiescence in the conclusions of the reports and acceptance of payment on the vouchers or bills of lading.

The argument for the appellant proceeds upon the misapprehension that the contractor obtained an award in his favor, and received the money. Such is not the fact. The Board of Survey had no jurisdiction over the matter of freight money; that was definitely fixed by the contract, and there was no controversy concerning it.

The final ground of defense is, that the claimant is concluded by the acceptance of the money and the receipt he signed.

The gist of the inquiry is, whether the money was paid and accepted as a satisfaction. If it was, there is an end of the case. If it was not, the right of action remains.

This is what is decided in *U. S. v. Adams*, 7 Wall., 468 (74 U. S., XIX., 249); *U. S. v. Child*, 12 Wall., 282 (79 U. S., XX., 360); *U. S. v. Clyde*, 18 Wall., 37 (80 U. S., XX., 480).

In the case of *U. S. v. Justice*, 14 Wall., 535 (81 U. S., XX., 758), care was taken to define the limits of the rule laid down, as follows:

"It is always in the power of parties to compromise their differences. One way of doing this is by arbitrators mutually chosen; but from such submission, neither party is at liberty to withdraw after the award is made. The condition of the government creditor is better than this; for if dissatisfied with the allowance made him by the commission, he can refuse to receive it, or can accompany his receipt, if he chooses to take it, with a proper protest. This protest is necessary to inform the Government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the Court of Claims. If, with this

knowledge and under these circumstances, the money is paid, there can be no just cause of complaint, and the status of the parties is not affected by anything which transpired before the Commission."

The rule here laid down covers this case, and laps over all around.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal from the judgment of the Court of Claims.

But a single point is presented for our consideration. The case arose out of a contract for the transportation of army supplies. The 8th clause of the contract provided that upon the arrival of the stores transported, at their point of destination, a Board of Survey should be called without delay, who should examine their quantity and condition. In case of loss, deficiency or damage, it was made the duty of the Board to investigate the facts, assess the amount of loss or injury, and state whether it was attributable to neglect or to the want of care on the part of the contractor, or to causes beyond his control. It was further provided that a copy of the proceedings of the Board "shall be furnished to the contractor, shall be attached to the bill of lading and shall conclude the payments to be made on it." For deficiency and damages, the contractor was to pay the cost at the point where he received the supplies, and freight was to be deducted in the latter case in proportion to the amount of the damages assessed.

If no Board should be called, through the neglect of the proper military authority, it was to be considered that the contractor had delivered all the stores specified in the bill of lading in good order, and he was to be paid accordingly. Such a Board was called and reported in several instances. All the reports were in the following form:

"Proceedings of a Board of Survey, which assembled at Fort Lyon, C. T., by virtue of the following order, viz.:

HEADQUARTERS, FORT LYON, C. T., July 31st, 1865.

(Special Order No. 145.)

"A Board of Survey is hereby ordered to meet at the commissary building to-morrow morning at nine o'clock, or as soon thereafter as practicable, to examine and report upon the quantity and condition of certain commissary and quartermaster's stores being received by Lieut. C. M. Cossett, A. A. Q. M. & A. C. S.

Detail for the Board.

First Lieutenant J. A. Cramer, Veteran Battalion First Colorado Cavalry; First Lieutenant Henry Gronheim, Fifteenth Kansas Cavalry.

By order of Theo. Conkey, Captain Commanding Post.

(Signed)

JAMES OLNEY, Second Lieutenant and Post Adjutant.

Fort Lyon, C. T., August 1st, 1865."

"The Board met pursuant to the above order. Present, First Lieutenant J. A. Cramer, Veteran Battalion First Colorado Cavalry, and First Lieutenant Henry Gronheim, Fifteenth Kansas Cavalry, and proceeded to examine the supplies delivered by Freight Contractor W. S. Shrawe-

bury, in contractor's train, No. 124, Fort Lyon, No. 5, and find as follows:

Packages all correct and in good order, with the exception of nine sacks of corn, deficient. Weight agreeing with the B. L., with the exception of four thousand two hundred and forty (4,240), pounds of corn deficient.

The Board, therefore, recommend that the deficiency of corn be charged to the Freight Contractor, and that Lieutenant C. M. Cossett, A. A. Q. M., be permitted to drop said deficiency from his return.

The Board then proceeded to other business.

JOSEPH A. CRAMER,
First Lieutenant Veteran Battalion First Colorado Cavalry, President.

HENRY GRONHEIM,
First Lieutenant Fifteenth Kansas Cavalry, Recorder.

Approved.

THEO. CONKEY,
Captain Third Wisconsin Cavalry, Commanding Post."

In all instances the contractor was paid the amount due according to the bill of lading, less the deductions found by the Board to be chargeable against him, and gave a receipt as follows:

"Received at Fort Leavenworth, Kansas, the 23d of October, 1865, of Captain H. L. Thayer, Assistant Quartermaster, United States Army, the sum of ninety-one thousand two hundred and forty-three dollars and sixty cents, in full of the above account.

(Signed in duplicate)

W. S. SHREWSBURY.
By Andrew Stuart,
His Attorney."

In each case the contractor, when the receipt was given, "Protested against the deduction and gave notice to the quartermaster who made the payment, that he should look to the defendants for a corrected adjustment and for full payment." The Court of Claims held for naught the findings and recommendations of the Board.

The counsel for the appellee maintains that this was right, because the agreement was, that in case of deficiency, the Board should "Investigate the facts and report the apparent cause, and assess the amount of loss or injury, and state whether it was attributable to neglect or want of care on the part of the contractor, or to causes beyond his control," and that their proceedings failed to carry out the intent and terms of the contract in these particulars. This is too narrow and technical a view of the subject. The provision of the contract touching the Board was important to the Government. The points of delivery were in the wilds of the West. If there was any failure by the contractor, the time and place of delivery were the time and place to ascertain the facts, and to put the evidence in an effectual shape. Afterwards it might be impossible for the Government to procure the proofs; and if it were done, the expense might greatly exceed the amount of the items in dispute. At the delivery, the bill of lading spoke for itself. The teamsters and guards who accompanied the train were present, and could readily be examined. It is said by the Court of Claims, in their conclusions of law, that the Board failed to make the requisite investigations of the facts. To do this was one of the most important duties devolved upon them. It is to

See 23 WALL.

U. S., Book 28.

be presumed they discharged it. They did not say, in terms, that they had done so, but they reported conclusions carrying with them the strongest implication that what was recommended, rested on a basis of ascertained facts. The Board, as honest men, could not have announced such results without the proper previous examination. The means were at hand, and the work was easy. A formal and technical instrument was not to be expected from military men acting under such circumstances. We think the reports were sufficient, and that they conform in every substantial particular to the requirements of the contract.

It does not appear that the contractor objected either as to form or substance when the reports were made, nor that he disclosed any objection subsequently until the time of payment. Nor did his objections then assume a definite shape. He notified the quartermaster that he should claim a re-adjustment and full payment. The reasons and grounds of the claim were not stated. The payments were made at a distant point and after the lapse of several months. The witnesses were then scattered and gone. Most of them, doubtless, were difficult if not impossible to be found. As the contractor was silent when he should have spoken, he cannot be permitted to speak at the later period, in the altered condition of things, which then existed, as regards the other party. He must be held to have waived any exception which he might have taken at the proper time, and to have been, when the payments were made, finally concluded.

The judgment of the Court of Claims is reversed and the case will be remanded, with directions to dismiss the petition.

Mr. Justice Field dissented.

SAMUEL FASHNACHT, *Plff. in Err.*,

v.

MICHAEL FRANK.

(See S. C., 23 Wall., 416-420.)

*Removal of cause from State to Federal Court—
questions reviewable on appeal from State Court.*

1. A petition by the defendant for the removal of a cause from a State Court to the Circuit Court of the United States was properly overruled, where a final judgment had already been rendered in the State Court.

2. Where, subsequently to the refusal of the petition, an appeal from the judgment was taken to the Supreme Court of the State, only such questions as either have been or ought to have been passed upon by that court, in the regular course of its proceedings, can be considered by this court upon error.

3. The decision on the right of removal of the inferior State Court, not having been excepted to, nor presented to nor considered by the Supreme Court of the State, cannot be considered by this court, on an appeal from the judgment of such State Supreme Court.

[No. 564.]

Submitted Feb. 15, 1875. Decided Feb. 22, 1875.

IN ERROR to the Supreme Court of the State of Louisiana.

On motion to dismiss.

The case is stated by the court.

Messrs. T. J. Durant & C. W. Hornor,
for defendant in error:

"1. The lantern guard *a*, constructed entire, without hinge or joint, so that, as a whole, it can be readily detached or removed from the lantern, as set forth.

2. The disc *g*, in combination with the ring or band *b*, of the guard and fastenings *e*, substantially as and for the purposes specified.

3. The guard *a*, in combination with the disc *g*, fastenings *e*, and removable globe *d*, substantially as specified."

The letters in these claims refer to drawings, constituting a part of the specifications, but the parts designated will be readily understood from the foregoing description.

The first claim, which was for the removable guard alone, was afterwards surrendered by a formal disclaimer filed in the Patent Office April 12, 1871.

The other two claims are for combinations; but the disc designated in the drawings by the letter *g*, and being the disc before mentioned, as being used to fill or cover the space between the circular top of the guard and the contracted top of the globe, and to hold the latter in place, is the central and important element in each combination. In the second claim it is combined with the top ring or band of the guard and the fastenings that connect them; in the third, it is combined with the guard, the fastenings and the removable globe. But in both, all these elements are presupposed and implied. The idea of the guard is never dissevered from the circular ring or band which forms its top, and the guard and disc are never dissociated from the globe with its contracted top and capacity of removal. It is a globe lantern with the globe removable and contracted at top, to which the improved guard, with its enlarged and circular top and the attendant intervening disc are adapted, and for which they are constructed. This is what the patentee in substance says, and what, indeed, is essential to make his claim to invention even plausible.

From the evidence before us, it appears that when Westlake applied for his patent in March, 1864, all the elements of his improvement were well known. Butterfield's lantern, patented in 1855, and Lampport's, presented to the Patent Office for a patent in 1858, both had removable guards with bands at the top, and contracted topped globes, the guards being so constructed, however, as to open like a jacket, and thus to be removed from the lantern. But the top of the guard, when in place, fitted closely around the top of the globe and, therefore, there was no place or occasion for a disc between the guard and the globe, as in Westlake's lantern.

In Canning's lantern, and in Max Miller's, both presented for patents, and the latter patented in 1858, there was a nearer approach to Westlake's. They had a guard with an enlarged top, consisting of a circular ring, large enough to allow the globe to be removed through the same, and this top was connected by fastenings; bayonet fastenings are exhibited, with the dome, the bottom of which was spread out like a broad flat bell, and might have served the purpose of a disc in Westlake's lantern, had it been admissible or required. But in these lanterns, the top of the globe not being contracted, as in Westlake's, it filled the top of the guard, and left no intervening space for a disc between them. With this exception, namely: that the top of the globe was

not contracted, the difference between the lanterns of Canning and Max Miller and that of Westlake, was very slight. And as globes with contracted tops were not new, it may be deemed somewhat doubtful whether the application of such globe to these lanterns (Westlake's being little more than this) was entitled to the merit of invention and, therefore, patentable.

In Waters' lantern, patented in 1855, there was a globe with a contracted top, such as is employed by Westlake, and said top was inserted for support in the lower part of the dome, around which a narrow flange spread outwardly, somewhat like Westlake's disc, far enough to receive, in small apertures, the wires of the guard, the tops of which, not being connected by a ring or band, were inserted therein directly. But although the dome could be detached from the wires by pressing them inwardly, and lifting the dome off from them, and thus give room for removing the globe; yet, as the parts were arranged, this could not be done conveniently; and, in fact, the globe was not removed from the top of the guard, but the latter was detached at the bottom, and lifted off from the globe, when it was desired to have access to the latter.

In none of the lanterns thus far adverted to, was there fully exhibited and applied the disc described in Westlake's patent, used for the same purpose as his, although the germ of it was seen in Water's lantern, and an adaptable equivalent for it in Canning's and Max Miller's. But Westlake, in his testimony, admits that the disc was old at the time he made his invention, when used as a reflector in a conductor's lantern; and two English patents were put into the case, which exhibit it as used substantially in the same manner, and for the same purpose, that it is used in Westlake's lantern. The first was a patent granted to Graham Chappell in 1812, and the other to Isaac Evans in 1861. The use of the disc was somewhat similar in both of the lamps or lanterns described in these patents. That of Evans will be more particularly adverted to.

Evans' lantern had an inner chimney, contracted at the top, an outer globe, and a guard having a circular rim or band at the top. The disc was called in the patent a "crown plate," and filled and covered the space between the contracted top of the inner chimney and the outer globe, and between the latter and the top rim of the guard. It had some perforations to allow the air to pass upward between the chimney and globe. The specification says: "Above the top of the outer glass cylinder, *a* (the globe), and inside the upper ring, is placed a crown plate, *l*, provided with a number of projecting flanges, which serve to keep the upper part of the outer and inner glass cylinders, *a* and *b*, in their places." As this lantern was intended to be used in mines, the crown plate was fastened to the top or rim of the guard by a screw, so as to obviate the danger of its being accidentally detached; but when it was detached and removed, the globe and cylinder could be removed through the top of the guard, or the latter could be removed from the lamp by detaching it from below. This crown plate, therefore, seems to have served the precise office of Westlake's disc. Stetson, the complainant's expert, testifies as follows: "In

Evans' patent, Exhibit No. 1, the equivalency of the guard is somewhat doubtful; but I think it is substantially the same as the guard claimed in the first claim (of Westlake's patent). It has a glass chimney contracted at the top, within the globe, which is held in place by a disc supporting it at the top, and extending out to the ring at the top of the guard." This is a precise description of Westlake's disc. It is true, the witness adds: "But the disc has holes for the circulation of air; the disc, practically, only fills the space between the small top of the lamp chimney and the globe." But the fact that the globe had holes in it, does not deteriorate from its importance as a disc to fill and cover the space between the chimney and the guard, and to hold the former as well as the globe in place. The witness admits that, "If the small holes were made in the defendant's disc, their lanterns would still infringe the second claim of the patent," thus implying that the holes do not destroy the identity of the disc.

Smith, the defendant's expert, says: "This lantern, Exhibit 1, representing Evans' patent, has a guard so made that it may be separated from the top and from base of the lantern, all in one piece. The parts are screwed together, instead of being held by catches; but it admits the entire removal of the dome from the guard, just the same. There is a plate inside the upper band of the guard, which has flanges upon it to maintain the top of the globe and the chimney, and this plate fills the entire space except so far as it is perforated. The globe can be raised through the top band of the guard. The guard, in this Exhibit 1, is whole and can be removed, not from the entire lantern, any more than the guard in Exhibit B (Westlake's), but from the other parts of the lantern, the same as the guard of Exhibit B. It cannot be removed from the other parts of the lantern as readily as the guard of Exhibit B, because it is screwed to the other part, and cannot be unscrewed as readily as spring catches can be worked.

The lantern, Exhibit 1, comes as completely within the first claim of the complainant's patent No. 3747, marked Complainant's Exhibit A, as the defendant's lanterns do.

The disc *g* is stated in the patent to be for filling and covering the space between the band and the top of the globe. There is such a disc in Exhibit 1, and it is the equivalent of disc *g*.

The fastenings in the lantern, Exhibit 1, for securing the disc to the guard or the guard to the disc, are not like the fastenings *e*, shown in the patent No. 3747, but they are equivalents for each other, because both specifications say that other fastenings may be used, and they both produce the same result and admit of the complete separation of the guard and discs, and in Evans' Exhibit 1, the globe can be removed.

The combination claimed in the second claim of the patent No. 3747, Exhibit A, is substantially embodied in the lantern Exhibit 1, unless the claim embraces the guard *a*, removable, leaving an entire lantern.

There is a loose globe in Exhibit 1, and it therefore substantially embodies the third claim; but there is a difference in construction between the lantern guards."

This testimony seems to us to be corroborated

by the patents and other exhibits; and from this it sufficiently appears that both the second and the third claims of Westlake's patent are exemplified in Evans' lantern. It has the combination of the disc, the band and the fastenings specified in the second claim, and that of the guard, the disc, the fastenings and the globe, specified in the third claim. Whilst, therefore, it may be true that none of the lanterns referred to are equal to Westlake's in beauty of form or convenience of adaptation to the purpose for which it is intended, yet every part has been anticipated and used in some form or other for the very purposes and uses to which it is applied in Westlake's; and in Evans' lantern all the essential parts are brought together and used in the combinations claimed by the patentee. Of course, the combination must be new; and if productive of new and useful results, and not a mere aggregation of results, might be the subject of a patent, though all the parts were used before. But here, the combinations patented, as well as their separate elements, had been anticipated.

The decree is, therefore, affirmed.

PETER F. PETERS, *Appl.*,

v.

THE SCHOONER DEXTER, CHARLES R. LEONARD, Claimant.

(See S. C., "*The Dexter*," 23 Wall., 69-76.)

Want of lookout in collision—vessels meeting end on—obligatory rule—imminent peril.

1. Sufficient lookouts are required by the rules of navigation; but where it appears that the officer in charge of the deck of the colliding vessel saw the approaching vessel while she was yet so distant that no precaution to avoid a collision had become necessary, and that the want of a lookout did not and could not have contributed to the collision, the vessel omitting such a proper precaution will not be held responsible for the consequences of the collision, if in all other respects she is without fault.

2. Sailing ships are meeting end on, within the meaning of the 11th sailing Rule prescribed by Congress, when they are approaching each other, from opposite directions or on such parallel lines as involve risk of collision on account of their proximity.

3. Such rule is obligatory upon vessels approaching each other, from the time the necessity for precaution begins and so long as the means and opportunity to avoid the danger remain.

4. Where two schooners, half a mile apart, were approaching each other in opposite directions, and the schooner of the claimant ported her helm as required by that rule, and the schooner of the libellant held her course until the danger became imminent, and then by mistake put her helm in the wrong direction, which rendered a collision inevitable, the latter cannot recover damages for the collision from the former.

5. Imminence of the peril occasioned by the negligence, carelessness or unskillfulness of those in charge of the vessel setting up such an apology, is no excuse for a violation of a plain rule of navigation.

[No. 114.]

Submitted Dec. 18, 1874. Decided Jan. 11, 1875.

NOTE.—Collision; measure of damages for. See note to *Smith v. Condry*, 42 U. S. (1 How.), 28.

Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 51 U. S. (10 How.), 557.

Rules for avoiding collision; steamer meeting steamer. See note to *Williamson v. Barrett*, 54 U. S. (13 How.), 101.

A PPEAL from the Circuit Court of the United States for the District of Maryland.

The case is stated by the court.

Messrs. R. F. Brent, W. S. Waters and W. S. Bryan, for appellant.

Messrs. S. T. Wallis and John H. Thomas, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Regulations to prevent collisions between vessels engaged in navigation have been adopted by Congress, and the precautions prescribed for that purpose are obligatory in all cases where they apply; as, for example, if two sailing ships are meeting end on or nearly end on, so as to involve risk of collision, the requirement is that the helms of both shall be put to port, so that each may pass on the port side of the other. 13 Stat. at L., 60.

By the transcript it appears that the libel was filed by the owner of the schooner *Mary Julia*, to recover the value of the schooner and of her cargo, which were sunk in Chesapeake Bay by a collision which occurred on the 17th of November, 1870, between her and the schooner *Dexter*, belonging to the claimant.

Heavily laden with oysters, the schooner of the libelant was bound up the bay on a return trip from the oyster grounds below, being employed in dredging for oysters and in transporting such cargo to the port to which she was destined; being on a return trip and so laden with a full cargo, she collided on the morning of that day with the schooner of the claimant, bound down the bay from the Port of Baltimore to Tread Haven River, and the effect of the collision was, that the schooner of the libelant was sunk and, with her cargo, became a total loss.

Compensation for the loss is claimed of the other schooner upon the ground that the collision was caused by the careless, negligent, unskillful and improper management of those in charge of the schooner belonging to the claimant. Service was made and the claimant appeared and filed an answer, in which he denies all the material allegations of the libel, and charges that the collision was caused entirely by the careless, negligent and unskillful management of those in charge of the schooner of the libelant.

Proofs were taken and the parties were heard and the district court entered a decree dismissing the libel, and the libelant appealed to the circuit court. New proofs were taken in the circuit court and the parties were again heard; but the circuit court affirmed the decree of the district court dismissing the libel.

Defeated in both the subordinate courts, the libelant appealed to this court, and now submits the case upon the whole evidence, without any formal assignment of errors as required by the amendment to the 21st Rule.

Both vessels, it seems, were seaworthy and well manned and equipped; nor is there any sufficient ground to doubt that both had sufficient lookouts, under the circumstances, and proper signal lights.

Objection is made by the libelant that the lookout of the other schooner was insufficient, but it is unnecessary to decide the question, as the evidence is full to the point that it was a clear night, and as each vessel was seen by the
See 23 WALL.

other long before there was any necessity for precaution and in ample time before the collision to have done whatever the circumstances required to have prevented the disaster. Sufficient lookouts are required by the rules of navigation, but where it appears that the officer in charge of the deck saw the approaching vessel while she was yet so distant that no precautions to avoid a collision had become necessary, and that the want of a lookout did not and could not have contributed to the collision, the vessel omitting such a proper precaution will not be held responsible for the consequences of the disaster, if in all other respects she is without fault. *The Farragut*, 10 Wall., 387 [77 U. S., XIX., 947].

Differences of opinion exist among the witnesses, as to the course of the wind; but the discrepancy in that regard turns out to be of little moment, as it is clearly proved that the two vessels, when a half mile apart, were approaching each other from opposite directions.

It is insisted by the libelant that the wind was from the northwest and that his schooner was close-hauled. On the other hand, it is contended by the claimant that the wind was west by north, and he denies that the course of the schooner was such as is alleged by the libelant.

Strong doubts arise whether the wind was as far north as the point assumed by the libelant; and the proofs fail to convince the court that it was as far to the west as is supposed by the claimant. Difficulties attend the inquiry, but the better opinion is that the course of the schooner of the libelant was not as close to the wind as she would lay, without impeding her headway. Nor is it very material whether she was or not when the vessels were first seen by each other, as they were then two miles apart and were moving through the water, by estimation, at the rate of fourteen or fifteen miles an hour. Satisfactory proof is exhibited, that the schooner of the claimant was heading south-southwest, and whatever may have been the course of the other schooner when they were two miles apart, the proof is equally satisfactory that her course when they were half a mile apart was exactly opposite to that of the schooner of the claimant. Evidence is certainly exhibited in the record tending to show that the course of the schooner of the libelants was east-northeast when the vessels were first seen by each other, but it is convincing that when they were only a half mile apart they were approaching from exactly opposite directions and that the case falls within the true intent and meaning of the 11th sailing Rule prescribed by Congress.

Sailing ships are meeting end on, within the meaning of that provision, when they are approaching each other from the opposite directions or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins, which cannot be definitely defined, as it must always depend, to a certain extent, upon the speed of the respective vessels and the circumstances of the occasion. *The Nichols*, 7 Wall., 664 [74 U. S., XIX., 159].

Rules of navigation, such as the one mentioned, are obligatory upon vessels approaching

each other from the time the necessity for precaution begins and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision.

Apply the 11th sailing Rule to the case and it is clear that the decree of the circuit court should be affirmed, as the evidence shows that the two vessels when they were half a mile apart were approaching each other in opposite directions and that the schooner of the claimant ported her helm as required by that Rule; and it is equally clear that the collision would have been prevented if the schooner of the libelant had performed her duty in that regard. Instead of that, she held her course until the danger became imminent, and then, by the mistake of the man at the wheel, put her helm in the wrong direction, which rendered the collision inevitable.

Attempt is made in argument to exculpate the error of the helmsman upon the ground that the danger was imminent, but such an excuse cannot be admitted as a valid one where it appears that the imminence of the peril was occasioned by the negligence, carelessness or unskillfulness of those in charge of the vessel setting up such an apology for a violation of a plain rule of navigation.

Serious conflict exists in the testimony as to what was done by the respective vessels when they were more distant from each other, but it is not deemed necessary to give that part of the evidence much examination, as it is clear that they had ample time and opportunity to adopt every needful precaution to avoid a collision after it must have been apparent to both that they were fast approaching each other from opposite directions.

Resort is had by the libelant to that part of the evidence to show that the case falls under the 12th sailing Rule and not under the 11th, as contended by the claimant. Even suppose that proposition could be maintained, which is denied, it is quite clear that it would not benefit the libelant, as it is conceded that his schooner changed her course by putting her helm to starboard, and that it was that error which produced the collision.

Viewed in any light, it is clear that the libelant is not entitled to recover, and that the decree of the circuit court must be affirmed.

Decree affirmed.

Cited—23 Wall., 177; 5 Hughes, 304.

WILLIAM MASON, *Appt.*,

v.

EDWARD H. GRAHAM ET AL.

(See S. C., 23 Wall., 261-278.)

Mason's patent for looms—measure of profits—difference in cost—damages.

1. The defendant Mason's picker-staff motion for looms is practically the same as that patented to

the complainant Graham, and is an infringement thereon.

2. Where defendant had made and sold infringing motions as part of the looms manufactured by him, and had sold such motions also separately, the latter sales furnish a much better measure of profits than is a ratable proportion of the profits on an entire loom.

3. Where the defendant made the infringing motions under a patent granted to him, and they cost about fifty cents less than the motions made by the plaintiffs, the difference in the cost being due to his invention, the complainants are not entitled to such savings or profits resulting from the defendant's own invention.

4. The defendant has been excessively charged for the profits made by him where he has been credited with the cost only, without reference to the fact that the cost was reduced by his own invention.

[No. 97.]

Argued Dec. 3, 4, 1874. Decided Jan. 11, 1875.

A PPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Messrs. J. G. Abbott, C. M. Keller, C. F. Blake and B. Dean, for appellant.

Mr. J. E. Maynard, for appellees.

Mr. Justice Strong delivered the opinion of the court:

The object of the invention patented to the complainants in the court below was, to produce an accurate and sure picker-staff motion in looms by a combination of devices which, while giving great accuracy of motion, so guides and holds the picker-staff as to enable it to work with the least possible friction and lateral disarrangement. In all picker-staff motions it is desirable, if not essential, that the end of the staff made to strike the shuttle should move in a right line, so as to drive the shuttle directly along the shuttle race in the line in which it is desired to play. This has been effected by constructing the lower end of the staff in the form of a rocker, the exterior curve of which is an arc of a circle described from a center corresponding with that point in the shaft that strikes the shuttle. This rocker is made to roll on a bed, the face of which is extended parallel to the shuttle race, and which is placed on the outside of the loom beneath the lay. How to connect the rocker with the bed, so that the picker-staff may be maintained in proper position upon the bed, has been a subject of much inquiry. Various modes had been suggested before the complainants obtained their patent, and several of these modes had been described in patents for improvements in looms granted to other inventors. The invention described in the patent to the complainants relates to such a connection. It is primarily a combination of a rocker with a bed, by means of loose journals projecting each side of the picker-staff and arranged beneath it, substantially as described in the specification. As in other arrangements for picker-staff motions, the rocker is made to play upon a horizontal bed parallel to and below the shuttle race, and the bed has a socket fastened longitudinally through its base for the passage of the shaft of the loom. The shank of the rocker is made hollow, that is, with a box or bearing extending through its tread upwards into which a shaft arm or bar is inserted. This bar or shaft arm is fitted with journals projecting on each side at right angles with the rocker and resting in eyes formed in the bed-piece

which constitute the journal bearings. The eyes have inclined slots cut in them so that they form ears or open boxes into which the journals are inserted when the parts of the picker-staff motions or the constituents of the combination are put together. Thus, the shaft and the journals can readily be removed and replaced, and the journals are free to play without working out of their bearings. The rocker is retracted and caused to move by means of a spiral spring wound loosely around a short shaft below the bed, and attached at one end to a plate which turns freely on the shaft; and the plate is connected by a strap with a hook extending from the under side of the rocker or the lower end of the shaft arm. This seems to be a sufficient description of the combination. The patentees, after having described the drawings of their specifications, say:

"The first part of this invention relates to the positions of the journals. This position is determined by the position of the socket for the picker-staff, which socket is so placed that the point of the picker-staff which strikes the shuttle must move in the required line; and this part of the invention consists in placing the journal at or near this socket, and as near the level of the bed as practicable. In this position there is the least possible wear, and the journals perform all their functions to the best possible advantage. It is obvious that, as every point upon the rocker varies its position in the action of the motion with reference to the bed, it is impossible to connect the journal directly with the rocker, and its box directly with the bed, or *vice versa*. One or the other must be indirectly connected, and it is for this reason that, in the motion described, the journals are placed upon the arm G, upon which the rocker can play up and down. So far as we know, no rocker has ever been combined with its bed by means of journals before this invention.

The second part of this invention consists in forming the boxes or bearings for the journals with such an opening that the journals may be laid in them in putting the motion together without liability to work out in the operation of the rocker, as plainly shown in the drawings. This method of construction is much cheaper than making the boxes cylindrical, and is quite as efficient in every respect."

The claims made in the specifications are:

1. The combination of a rocker, of a picker-staff with its bed, by loose journals projecting each side of the picker-staff, and arranged beneath the picker-staff substantially as described.

2. In combination with the rocker, the bed and the journals, the open boxes substantially as and for the purpose described.

3. In combination with the rocker and its bed, the journal-bearing arm, operating substantially as and for the purpose specified.

By the arrangement thus described and claimed, it is manifest the rocker is prevented from sliding perceptibly on its bed and it is kept true in its bearings by the arm or bar from which the journals are projected, the arm having also a long bearing in the box of the rocker. The journals, moreover, having bearings in the ears of the bed, steady the rocker, resist any lateral movement, and prevent what is denominated as "wabbling." As the picker-

staff is made to oscillate, its rocker rises and sinks upon the arm, and thus most of the friction caused by the play of the staff comes upon the shaft, or journal-bearing arm, and not upon the tread of the rocker or the bed-plate.

Such is the invention patented to the complainants in the re-issued patent. Such are the results obtained by it, and such is its mode of operation. We think the invention has no relation to any mere form of a journal-bearing arm. Nor do we think it consists in arranging a journal-bearing arm in a slot of the rocker. In our opinion it embraces every combination of a rocker with a bed and loose journal-bearing arms, arranged so as to produce the result described in the specifications as effected by the combination.

And we have been unable to perceive that the invention was anticipated by any of those devices which the defendant has given in evidence. Of these, four only need be noticed. They are those described in the earlier patents granted to Benjamin Lapham, to David Barnum, to Rensselaer Reynolds and to William Stearns. We do not propose to go into any critical examination of them. The case does not call for it. Of them all it may be said that while each has a rocker and a bed, no one connects the rocker with the bed by means of loose journals, or by loose journal-bearing arms, and no one of them obtains the beneficial results secured by the invention belonging to the complainants. In Lapham's invention there is one journal on the bed, and one on the rocker; both on the same side of the picker-staff. Obviously this device could not prevent wobbling, or the sliding of the rocker on the bed. Barnum's invention has no journal, journal boxes or journal-bearing arms. Nor has the device of Stearns. In the Reynolds' patent the rocker is described as held to the bed by means of a strap fastened at one end to the under face of the rocker, and at the other, to a point in the groove of the bed-piece, in which the rocker rolls. It is but faintly claimed, if at all, that any of these patents describe the invention of the complainants. The defendant has used them rather as exhibiting the state of the art when the Graham and Rouse patent was granted, and as requiring that patent to be construed to cover only a combination, of which a journal-bearing arm sliding vertically in a hollow place or box in the rocker, and having journals which turn in open boxes in the bed-piece, is an essential constituent. We think, however, they exhibit no such state of the art as requires that construction to be given to the patent, and we cannot perceive that such a construction is justified by the language of the specification and claims.

We come, then, to the inquiry whether the devices made and sold by the defendant are substantially the same as those patented by the re-issued patent; or, in other words, whether the picker-staff motion made and sold by the defendant is an infringement upon the complainants' right. Upon this question the opinions of the experts examined are in direct conflict, and we are, therefore, under the necessity of comparing for ourselves the two devices. We have already said that the object sought to be accomplished by the complainants' invention was the prevention of wobbling of the picker-staff, and compelling it to move steadily, without

lateral deflection, in the required plane. It is not denied that exactly this is the object at which the defendant's motion is aimed. It remains, then, only to determine whether the means by which the intended result is obtained are substantially the same. That both the combinations connect a rocker to its bed by journals indirectly, employing an arm to effect such indirect connection, is made clear by inspection. In Mason's motion the arm is attached by a second journal, in the complainants' by a slot in the rocker. It is true the form and the location of the arms differ, but they perform the same functions, and in substantially the same manner. Both are journal-bearing arms. Both connect the journals, whether they are on the rocker or on the bed, indirectly with the bed in the one case, or with the rocker in the other. Each, then, is a combination of a rocker with a bed, by loose journals projecting on each side of the picker-staff, and the combination is effected by means of a journal-bearing arm. That the form of the journal-bearing arm of the defendant's motion is unlike that of the complainants' or that its mode of attachment is different, is immaterial, so long as it performs the same function in substantially the same way. We are, therefore, of the opinion that the defendant's picker-staff motion must be considered as practically the same as that patented to the complainants, and, therefore, that the charge of infringement is sustained. The circuit court then correctly ordered that the defendant should account.

But we think there was error in the ascertainment of the profits with which he was charged. The master to whom the statement of the account was referred reported that the defendant had made and sold three thousand six hundred and thirty-nine pairs of the infringing motions as a part of looms manufactured in his establishment, and that the profits resulting from the manufacture and sale of such motions had mingled with the profits from the manufacture of looms. He further reported that the cost of making the looms, including the motions, was \$59.63; that the cost of making the motion was forty-five and one half cents each, or ninety-one cents for each loom; and that the profits resulting from the manufacture of each loom, including the pair of motions, was \$5.64. Assuming these to be the facts the appellant insists that he should have been charged with only eight cents and six tenths of a cent as the profit made by him on each pair of motions, that bearing the same proportion to \$5.64, the whole profit on the looms, which ninety-one cents, the cost of a pair of motions, bears to \$59.63, the cost of the entire loom with the motions. To this we cannot assent. It appears from the master's report that the defendant sold four hundred and fourteen pairs, separately from the looms, at \$2 per pair, and two hundred ninety-seven and one half other pairs for \$584.75. These sales furnish a much better measure of profits than is a ratable proportion of the profits on an entire loom. It may fairly be presumed from them that the profits on the sale of looms, with the motion attached, were increased by the infringing device quite as much as was the profit on the motions sold separately. It does not appear at what profit, if any, the looms could have been

sold without the picker-staff motion attached.

But the master further reported, that the defendant made the infringing motions after a pattern of his own devising; that they cost per pair fifty cents less than the picker-staff mechanism which he had immediately before put upon his looms; that they were made under a patent granted to him, and that they cost about fifty cents less than the motions made by the plaintiffs, the difference in the cost being due to his invention. If this is so, it is clear that the fifty cents saved on each pair, equivalent to fifty cents profit, is not due to the complainants' invention. Were it not for the defendant's improvement the cost of making a pair of motions would have been, not ninety-one cents, but ninety-one plus fifty cents, or \$1.41, and the profits on each pair would have been fifty-nine cents, instead of \$1.09 charged to the defendant. Manifestly the complainants are not entitled to the savings or profits resulting from the defendant's own invention.

The defendant, therefore, has been charged by the master's report, confirmed by the court, too much for the profit derived from the sale of four hundred and fourteen pairs of motions sold separately from the looms, and from the sale of two hundred and ninety-seven and one half motions, also sold separately from the looms. For the former he should have been charged \$243.26, instead of \$451.26, and for the latter \$175.53, instead of \$263.

We think, also, that the defendant has been excessively charged, for the profits made by him on the three hundred and forty-six beds and the one thousand five hundred and forty-eight rockers sold by him at various times, for the repair of bridle motions previously made. He has been credited with the cost only, without reference to the fact that the cost was reduced by his own invention. The complainants have not shown how much the cost would have been, had the defendant made them without employing his own improvements. Under such circumstances, it appears just to assume that but for the improvement of the defendant the cost of making the bed would have been forty-two cents instead of twenty-seven and two tenths, and the cost of making the rockers would have been nineteen and two tenths cents instead of twelve cents and four mills, as reported by the master. The consequence of this is that the profit on the three hundred and forty-six beds sold was only \$167.68, and the profit on the fifteen hundred and forty-eight rockers sold was only \$471.49.

The decree, therefore, should have been in favor of the complainants for:

1st. Profits on bridle motions sold on looms,	\$1819.50
2d. Profits on 414 pairs sold separately,	243.26
3d. Profits on 297½ pairs sold separately,	175.53
4th. Profits on the beds sold,	167.68
5th. Profits on the rockers sold separately,	471.49
Total,	\$2,877.45

A majority of the court is of opinion that the appellant is not entitled to a credit for the \$1,000 paid on the 25th of October, 1869, for which a receipt was then given.

The decree of the Circuit Court is reversed and the case is remitted, with instructions to enter a decree in favor of the complainants against the

defendant for \$2,877.45, with costs of suit in the court below. Each party to pay his own costs in this court.

UNITED STATES, *Appl.*,

v.

SAMUEL C. WILLIAMSON.

(See S. C., 23 Wall., 411-416.)

Army officer, when not absent from duty—when entitled to full pay.

1. An army officer ordered to proceed to his home and there to "Await orders, reporting thence by letter to the Adjutant-General and to headquarters," is not absent from duty with leave, although the order was made at the request of the officer.

2. Such officer is entitled to full pay, and is not reduced to half pay under the Act of March 3, 1863, which provides that an officer absent from duty with leave shall receive only half pay.

[No. 406.]

Submitted Dec. 21, 1874. Decided Jan. 11, 1875.

A PPEAL from the Court of Claims.

The case is fully stated by the court.

Messrs. Geo. H. Williams, Atty-Gen., and John Goforth, Asst. Atty-Gen., for appellant:

Captain Williamson was absent from duty with leave, being neither sick nor wounded; whether he technically asked for leave of absence *eo nomine*, or whether, within the spirit of the law, he elected to be placed on waiting orders. The Act itself merely says: "Absence from duty with leave," not necessarily by means of a leave of absence, so-called, but absence from duty with leave, howsoever that absence from duty had been accomplished, if according to law and the regulations. The Act of Mar. 3, 1863, says that he shall receive but half of the pay and allowances prescribed by law, and no more; and as he has received these, he has no further claim on the United States. The judgment was *pro forma* in favor of the claimant, in order that the question involved might be tested on appeal in the Supreme Court; the appellants having the sole right to so appeal in a case like this.

Mr. Halbert E. Paine, for appellee:

Neither the President nor the Secretary of War, nor the Paymaster-General can, merely by virtue of powers conferred by the Constitution, reduce the rate of compensation fixed by statute for officers of the army. Such reduction can only be made by virtue and in pursuance of statutory law.

The appellee did not ask for a leave of absence. He would not have accepted and could not have been compelled to accept such leave. There was nothing in the text of this order, No. 17, or in the law or regulations, or in the previous usage of the War Department, to warn him that if he should, with his own consent, be ordered to proceed to his home to await orders, he might afterwards be treated as absent on leave. Of course nothing in the Act of Mar. 3, 1863, conferred upon the Secretary of War any new or special authority relating to officers on leave of absence or awaiting orders.

If an officer should be ordered, with his own consent, to proceed to a designated point and await either the enemy or an uncertain future event, it would be no more unjust to treat such an officer as virtually on leave of absence and,

See 23 WALL.

therefore, entitled to only half pay because he assented to the order, than it would be to treat the appellee as virtually on leave of absence in the present case, because he assented to be ordered to proceed to his home to await orders.

Mr. Justice Hunt delivered the opinion of the court:

The claimant was commissioned captain in the Forty-Second Infantry, to rank from January 22, 1867; and served as captain in that regiment until it was consolidated with the Sixth Infantry by general orders Nos. 16 and 17, series of 1869, from headquarters of the army.

General order No. 16 was issued in compliance with the 2d section of the Act of Congress approved March 8, 1869, 15 Stat. at L., 318, by which the infantry regiments were required to be consolidated, and the whole number reduced to twenty-five regiments.

This order, after requiring the consolidation of infantry regiments as directed in the Act of Congress, further directs that the senior company officers, of each grade present for duty, with any two regiments to be consolidated and fit for active service, will be the officers of the consolidated regiment. The supernumerary officers will be ordered to their homes, to await further orders.

It is further provided in order No. 16, that all vacancies that may hereafter occur in the twenty-five infantry regiments will be filled by assignment of the senior officers of the same grade from the list of officers awaiting orders.

General order No. 17 provides that the company officers will be assigned as directed in general order No. 16, from the senior officers present and fit for active service with any two regiments consolidated; but should any of the officers so assigned prefer to await orders, the senior officers of the grade desiring service with their regiments may be substituted for them.

After the consolidation of the Forty-Second Regiment with the Sixth, the claimant was, on the 22d of April, 1869, regularly assigned Captain of Company H, in the Sixth Consolidated Regiment, and on the 20th of May following, he joined his Company H. On the 29th of the same month he was regularly transferred from Company H to Company A, *vice* Captain C. M. Bailey, unfit for active service.

It does not appear that the claimant ever joined Company A, to which he was transferred. Soon after his transfer he addressed the following note to the Adjutant-General:

"FORT GIBSON, CHEROKEE NATION, }
May 8, 1869. }

SIR: I have the honor, in accordance with par. 8, General Order No. 17, current series, headquarters of the Army, to elect to be placed on waiting orders.

I am sir, Very Respectfully, Your Obedient Servant,

S. C. WILLIAMSON.

Captain Sixth Infantry, late Captain Forty-Second Infantry.

Assistant Adjutant-General, Headquarters Department of Missouri, Fort Leavenworth, Kansas."

On the 21st of June, 1869, the Adjutant-General responded to the claimant's request as follows: "By authority of the General of the Army

Capt. S. C. Williamson, Sixth United States Infantry, is at his request relieved from duty in this department and will proceed to his home and await orders, reporting thence by letter to the Adjutant-General of the Army and to these headquarters."

The claimant was mustered out of service on the 31st of December, 1870.

From the 15th of December, 1869, to the 31st December, 1870, he was paid \$991.67, which was less than full pay by \$690.11, but he claims only \$680.11.

The action in the Court of Claims was brought to recover this balance. The court awarded to him the amount claimed, and the United States appealed to this court.

The argument against the allowance of full pay is based upon the Act of March 8, 1868, 12 Stat. at L., 736, which provides "That any officer absent from duty with leave, except from sickness or wounds, shall during his absence receive half of the pay and allowances prescribed by law, and no more." Captain Williamson, it is said, was, during the period in question, absent from duty with leave, being neither sick nor wounded, and hence, it is said, can receive but half pay, however that absence might have been caused. This argument is unsound.

The distinction between the case of an officer "absent from duty with leave" and that of an officer ordered to proceed to a particular place and there "to await orders, reporting thence by letter to the Adjutant-General of the Army and to these headquarters," is too plain to require much comment.

While absent from duty "with leave," the officer is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him.

The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place and to remain at that place. He cannot go elsewhere; he cannot return until ordered. He is as much under orders, and can no more question the duty of obedience than if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time.

The authority to give leave of absence is committed by law to particular persons; the mode of making the application for leave is pointed out and the maximum of its duration is prescribed. Army Reg., 1863, art. 21, adopted by the Act of July 28, 1866, 14 Stat. at L., 332. A department commander can grant leave of absence for a period not exceeding sixty days. Applications for leave exceeding four months must be referred to the War Department.

The direction, on the other hand, to proceed to a particular place, there to await orders, how long to remain there, to attack, to retreat, or to do any other specified thing, belongs to the officer in charge.

That the assignment was made at the request of the officer can make no difference. The pay is regulated by the position, and not by the manner or influence by which the position is acquired.

Captain Williamson was ordered by the Adjutant-General of the Department of Missouri,

by authority of the General of the Army, to proceed to his home and await orders, reporting thence by letter to the Adjutant-General of the Army, and to these headquarters.

The power to make this assignment was a portion of the executive authority, and was vested in the commander of the army. Captain Williamson was not only justified in obeying this order, but it was his duty to obey it. It was his duty to proceed at once to his home, there to remain, subject to orders to be communicated to him. He was expressly required by general order (No. 2) to make no application for special duty, but was informed that if his services were required a detail would be made without his application. He did proceed to his home and there remained waiting for orders until he was mustered out of the service. He was waiting orders, in pursuance of law, but was not absent from duty on leave.

It is not in the power of the Executive Department, or any branch of it, to reduce the pay of an officer of the army. The regulation of the compensation of the officers of the army belongs to the Legislative Department of the Government. Congress has fixed the pay of a captain of infantry at \$165 per month. The deduction of one half of the amount, when absent from duty on leave, is not applicable to the case of Captain Williamson. He is entitled to his full pay as a captain of infantry.

The Court of Claims has done right, therefore, in giving its award in his favor for the amount withheld, and its judgment is affirmed.

Cited—94 U. S., 221; 100 U. S., 609.

THE SCHOONER SARAH WATSON, ETC.,
SAMUEL R. SMITH ET AL., Claimants, *Libellants, Appts.*,

v.

THE STEAMER SEA GULL, THE SOUTH CAROLINA RAILROAD COMPANY,
CHARLES REEDER ET AL., Claimants;

AND

THE STEAMER SEA GULL ET AL., *Appts.*,

v.

THE SCHOONER SARAH WATSON, SAMUEL R. SMITH ET AL., Claimants.

(See S. C., "The Sea Gull," 23 Wall., 165-181.)

Steamer meeting sailing vessel, duty of—when steamer responsible for collision—immaterial error.

1. A vessel with sails, on meeting a steamer, is required to keep her course, and the duty of adopting the necessary measures of precaution to keep out of the way is devolved upon the steamer.

2. The steamer may go to the right or left if she can keep out of the way; but if not, and the approach is such as to involve risk of collision, she is required to slacken her speed, or if necessary, stop and reverse.

NOTE.—Collision; measure of damages for. See note to Smith v. Condry, 42 U. S. (1 How.), 28.

Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to St. John v. Paine, 51 U. S. (10 How.), 551.

Rules for avoiding collision; steamer meeting steamer. See note to Williamson v. Barrett, 54 U. S. (13 How.), 101.

3. If the steamer fails to keep out of the way, she is responsible for a collision, if the sail ship is without fault, unless the steamer can show that the collision was the result of causes which could not be foreseen or prevented, or of inevitable accident. A steamer held liable for a collision with a sailing vessel, where an order to starboard, given by the officer in charge of the steamer, was an improper order, and because the lookout of the steamer was negligent, and the steamer did not slacken her speed, nor stop and reverse in season.

4. Rules of navigation do not apply to a vessel required to keep her course after the opposite vessel has wrongfully approached so near that the collision is inevitable.

5. An error committed by the sail vessel under such circumstances of peril, if she is otherwise without fault, will not impair her right to recover for the injuries occasioned by the collision.

[Nos. 181, 182.]

Argued Jan. 7, 8, 1875. Decided Jan. 18, 1875.

CROSS-APPEALS from the Circuit Court of the United States for the District of Maryland.

The libel in this cause was filed in the District Court of the United States for the District of Maryland, by Smith *et al.*, against the steamer Sea Gull, to recover for the loss of the schooner Sarah Watson, occasioned by a collision with The Sea Gull. The district court decided that both vessels were in fault, and divided the damages. Both parties appealed to the circuit court, where the decree was, in substance, affirmed. Both parties took a further appeal to this court.

The collision took place twenty five or thirty miles south or southwest of Hatteras. The schooner was on her way from Wilmington to New York, and the steamer from Baltimore to Charleston. According to the statements of the libel, on the evening of the collision the schooner had all her lights, required by law, shining brightly and properly hung, and was heading northeast by east. The lookout descried and reported to her master a light ahead, which proved to be the foremast head-light of the steamer, several miles distant, and about one point on the port bow of the schooner. The schooner continued her course, and in a little while, the red or port light of the steamer, which was still on the port bow of the schooner, was seen by those on board the schooner. The steamer continued to approach the schooner, and when she was within about five times her length of the schooner, the green or starboard light of the steamer was seen by those on board the schooner, showing that the helm of the steamer had been starboarded. Those in charge of the schooner kept her steadily on her course, and the steamer continued with undiminished speed and struck the schooner on her port side, just aft her midships, with such violence as to cut three or four feet into the schooner. The answer set up, that some time after nine o'clock, by the steamer's time, the lookout on the steamer hailed the pilot-house, crying, "A vessel on the starboard bow." The course of the steamer was S. W. half W. The second mate, who was on deck, saw the vessel on the starboard bow, about the same time the lookout did, and at once gave the order "Hard a-starboard," to the man at the wheel, helping him to heave it hard a-starboard himself. When this order was given, no lights were seen, and the schooner was then supposed to be half a mile off, if not more. The steamer answering the wheel, her head fell off to port, and the second

mate then saw the schooner's red light plainly, and saw that she had ported her helm and changed her course, which brought her across the steamer's bow. Immediately the bell was rung and the engine stopped, and the captain was in the act of ringing the bell to back the ship when the collision took place.

The case further appears in the opinion of the court.

Messrs. S. T. Wallis and John H. Thomas, for the libelants:

1. The steamer alone was in fault. This is not a case in which the damages ought to have been divided between her and the schooner. The decree should have been in their favor for all the damages which they sustained. The amounts are set out in the decree of the district court (p. 11). About them there is no dispute.

2. The steamer was in fault because she ought to have had two lookouts; she had but one. He ought to have been stationed near her bow, where his view of approaching objects would have been unobstructed. He was stationed within a few feet of the stern; his view obstructed by the foremast and, consequently, did not see the schooner until she was seen by the second mate and the wheelman. The wheelman had to perform the double duty of wheelman and lookout. It was the captain's watch. He was asleep. The steamer took no measures to discover the course of the schooner when she was seen, but immediately starboarded, and a moment after ported her wheel; did not stop her engines until the moment of collision; did not reverse them at all, but approached the schooner at speed little abated, if at all, and struck her amidships, with so much force as to cut through three or four feet into her side.

3. The schooner was not in fault. Both of her lights were burning brightly. She saw the steamer's head light five miles off. Gave immediate orders to the helmsman, and several times repeated them, to keep her steadily on her course. She did not change her course from the moment she saw the steamer up to the moment of collision. If the testimony leaves any room for doubt on this point, it shows, at all events, that she did not change until they were within thirty or forty feet of each other. A change at such a moment would not have contributed to the collision. If it did, she will not be held responsible for the mistake, in a moment of well founded alarm and danger, needlessly produced by the previous fault of the steamer.

4. The collision occurred in the Atlantic Ocean, twenty miles from land. There was twenty miles of navigable water on one side; more than three thousand on the other. All the witnesses agree that there was no stress of weather, only a fresh seven knot breeze; that the wind was west-southwest; that the night was clear and starlight. The witnesses for the libelants say there was no haze on the water, and that a vessel could be seen from one to three quarters of a mile off.

Those for the respondents say that there was a haze on the water near the horizon; that the hull and sails of a vessel could be seen from half to three quarters of a mile off; that her lights were visible, some say a little further; others a mile off.

Shanks says her hull, sails and lights could

be seen about the same distance, from a half to three quarters of a mile off.

5. Upon either hypothesis the steamer is to be regarded, under such circumstances, as *prima facie* in fault. If proper precautions had been observed on her part, a collision would have been impossible, and the schooner ought not to be held responsible as a contributory cause of it, unless the evidence is clear that she did contribute to it.

The Oregon v. Rocca, 18 How., 571 (59 U. S., XV., 515); *The Carroll*, 8 Wall., 305 (75 U. S., XIX., 893).

6. Ocean steamers generally have two lookouts. *Chamberlain v. Ward*, 21 How., 570 (62 U. S., XVI., 219).

They ought to be stationed far forward on the lower deck, where there is nothing to obstruct their view of approaching vessels.

Chamberlain v. Ward (*supra*): *The Ottawa*, 3 Wall., 273 (70 U. S., XVIII., 167); *Genesee Chief v. Fitzhugh*, 12 How., 462; *St. John v. Paine*, 10 How., 585; *The New York v. Rea*, 18 How., 225 (59 U. S., XV., 361).

The Sea Gull had but one. He was on the fore-castle, within twelve or fifteen feet of the stern, aft of the foremast, between the main-mast and the foremast—the foremast, of course, obstructing his view of approaching objects.

Messrs. John H. B. Latrobe and I. Nevett Steele, for libelees.

Mr. Justice Clifford delivered the opinion of the court:

Experience shows that ships and vessels engaged in navigation are liable to be exposed to collision when approaching each other from opposite directions, or on intersecting lines, or even when approaching on parallel lines proximate to each other, and that seasonable precautions are indispensable, under such circumstances, to avoid such disasters, and to prevent the destruction of property and to save the lives of those employed in such important and perilous pursuits.

Until within a recent period, the sailing regulations founded in ancient usage, sometimes called sea laws, sanctioned by the decisions of the admiralty courts, furnished the principal rules of navigation in such emergencies, aided by the adjudications of the prize courts, whose practice conforms in some respects to the law of nations. Recently Congress has enacted regulations upon the subject, and those regulations are obligatory upon our commercial marine in all cases where they apply; but inasmuch as the Act of Congress does not profess to regulate the whole subject of sailing rules, it cannot be understood as superseding the prior established usages of navigation which are not embraced in the sailing rules contained in the Congressional enactment.

Signal lights of a prescribed character are required to be carried by steam vessels when under way, and sailing ships under way are required to carry similar lights, with the exception of the white mast-head lights, which they shall never carry. Such a requirement, however, is of very little or no value unless the lights are properly displayed and kept burning brightly, nor is it then of any value as a precaution unless those in charge of the other vessel

use the means to see the approaching lights before it is too late to adopt the proper measures to prevent a collision.

Lookouts are also required by the usages of navigation, but the object of the requirement will never be accomplished in case the lookout fails to perform the duty which the requirement contemplates. Nautical lookouts must be properly stationed, and should be vigilant in the performance of their duty, and if they are incompetent or inattentive, and the collision occurs in consequence of their neglect, the vessel to which the lookout is attached must be held responsible for the injury resulting to the other vessel.

Steamers approaching a sail ship in such a direction as to involve risk of collision are required to keep out of the way of the sail ship; but the sail ship is required to keep her course unless the circumstances are such as to render a departure from the rule necessary, in order to avoid immediate danger.

Vessels with sails being required to keep their course, the duty of adopting the necessary measures of precaution to keep out of the way is devolved upon the steamer, subject only to the condition that the sail ship shall keep her course and do no act to embarrass the steamer in her efforts to perform her duty. Doubtless, the steamer may go to the right or left if she can keep out of the way, but if not, and the approach is such as to involve risk of collision, she is required to slacken her speed, or, if necessary, stop and reverse, and if she fails to perform her duty as required by the rules of navigation she is responsible for the consequences if the sail ship is without fault, unless the steamer can show that the collision was the result of causes which could not be foreseen or prevented, or of inevitable accident.

Damages are claimed in this case by the owners of the schooner Sarah Watson, against the steamer Sea Gull, for the loss they sustained by a collision which occurred in the open ocean on the 21st of January, 1871, between the schooner and the steamer, by which the schooner was sunk and, with her cargo, consisting chiefly of resin, became a total loss. Many of the facts are conceded by both parties, or are so fully proved that they may be regarded as indisputable; as, for example, the voyage of the schooner was from the Port of Wilmington to the Port of New York, and the voyage of the steamer was from the Port of Baltimore to the Port of Charleston. All the witnesses agree that it was a clear, starlight night, though somewhat hazy on the water. They all agree, also, that the wind was west-southwest, blowing a fresh breeze; that the course of the steamer was south by west, half west, and the great weight of the testimony is that the course of the schooner was northeast by east, showing that they were approaching on converging lines, though varying somewhat, from opposite directions. Their joint speed was fifteen miles an hour, the speed of the steamer being one mile an hour greater than that of the schooner.

Both vessels had proper signal lights and both had lookouts, but the better opinion is that the lookout of the steamer was not as vigilant as he should have been in the performance of his duty. Strong support to that view is derived from the fact that the lights of the steamer were

seen by the lookout of the schooner when the vessels were three or four miles apart, but those in charge of the steamer saw nothing of the schooner until the two vessels were within a half mile of each other, and then saw at first only the sails of the schooner and those indistinctly.

Where the emergency is great, the order to the helmsman should undoubtedly be prompt, but, under the circumstances of this case, it was a rash act of the second mate to direct the man at the wheel to starboard the helm, as he did, before he had employed any available means to ascertain the course of the schooner: He admits that he had not seen the lights of the approaching vessel, and the lookout admits the same thing. They both say that they saw the sails, but they admit that they could not distinguish one sail from another, and it may be that it was the shadow of the sails and not the sails themselves which was present to their sight at that moment.

Evidently the order was an injudicious one, which is sufficiently shown by the testimony of the officer who gave it, as he admits that in a short time he found it to be advisable to countermand the order and to direct the wheelman to put the helm hard to port. Well founded doubt cannot be entertained, that if that order had been given in the first place the collision would never have taken place. Probably it was too late then, as the steamer had fallen off three or four points before the second order could be fully executed, and it appears that the collision occurred before the steamer could be brought back under the second order to the course she was pursuing antecedent to the first change made in her course.

These repugnant orders manifestly put the steamer upon a zigzag course, that is, first to the left and then to the right, and afford plenary proof that the officer in charge of the deck was in great doubt what to do; in which event it was his plain duty to slacken his speed, or, if necessary, as it plainly was, to stop and reverse, but he did nothing of the kind in season to render any such precaution effectual.

Undoubtedly, it was the privilege of the steamer to go to the right or left if in so doing she could, with reasonable certainty, keep out of the way; but if not, it became her imperative duty to slacken her speed and, if necessary, to stop and reverse.

Corresponding conclusions were reached by the district judge, except that he did not find that the lookout of the steamer failed to see the lights of the approaching schooner as soon as he might have done if he had performed his duty. Much reason exists, to conclude that the first error of the officer in charge of the deck was occasioned by that omission of the lookout, and that the excitement induced when he discovered that his first order was an improper one had more or less influence in promoting the subsequent errors. Subject to that qualification the views expressed by the district judge in respect to the conduct of the officer in charge of the deck of the steamer appear to be correct.

Cases arise, unquestionably, in which the want of a lookout, or his failure to perform his duty, will not be imputed to a vessel as a culpable fault, as where it appears that the other vessel was seen by the officer in charge of the deck in

season to adopt every needful precaution, and that the want of a lookout or his failure to perform his duty as such did not and could not have contributed to the disaster; but it is very doubtful, in view of the circumstances, whether the case before the court falls within the first condition, and it is quite clear that the evidence will not support the conclusion that the negligence of the lookout did not materially contribute to the subsequent mistakes and vacillating conduct of the officer in charge of the deck of the steamer. *The Farragut*, 10 Wall., 337 [77 U. S., XIX., 947]; *The Dexter* [ante, 84].

Approaching, as the two vessels were, on converging lines, it would clearly seem that the lookout of the steamer ought to have seen the schooner much earlier, as the evidence is full to the point that her signal lights were burning brightly, and if he had, it is not doubted that the collision would have been avoided, as the officer in charge of the deck of the steamer would, in all probability, have acted with more deliberation; in which event it may well be supposed he would not have given the direction that the course of the steamer should be changed before he had ascertained the course of the approaching vessel.

Considering the proximity of the vessels it may be admitted that prompt action was required; but it is plain that it was bad seamanship to change the course of the steamer before it had been ascertained whether the effect of the change directed would be to diminish or increase the danger to be apprehended from the impending peril. They, the two vessels, were still a half a mile apart, and time enough remained to adopt the proper precautions to prevent a collision; nor is it any valid excuse for the error committed, to say that the officer in command of the deck was ignorant of the course of the schooner when he gave the order to starboard the helm, as in that event he should have waited a moment for that information, or, if the peril was impending and the danger too immediate to justify any delay on the occasion, then he should have slackened his speed, or, if necessary, stopped and reversed, as required by the 16th sailing Rule.

Beyond all doubt the order to starboard, under the circumstances, was an error, and the evidence warrants the inference that the officer who gave it came to the same conclusion as soon as he saw the red light of the schooner, which he admits he did see in a very short time after he gave the erroneous order. Sufficient appears to satisfy the court that the order to starboard was given without due reflection, and that the attempt to correct the error by directing the wheelman to port the helm was not given in season to prevent the disaster, as the steamer in the meantime had fallen off more than three points.

By the sailing rules the steamer was bound to keep out of the way, and the whole evidence shows that she did not comply with that requirement, and the rule of decision in such case is that, *prima facie*, the steamer is in fault; nor does the case rest merely upon that presumption, for several reasons: (1) Because the evidence shows affirmatively that the order to starboard given by the officer in charge of the deck was an improper order. (2) Because the lookout of the steamer was negligent in the performance

of his duty. (3) Because the steamer did not slacken her speed nor stop and reverse in season to accomplish the object contemplated by the enactment containing that requirement.

II. Attempt is made in argument to show that the schooner also was in fault, and that the case falls within the rule which requires that the damages shall be divided.

Support to that charge is attempted to be drawn from the assumed fact that the schooner changed her course in violation of the rule of navigation which requires the sail ship to keep her course, as a correlative duty to that of the steamer whenever the latter is required to keep out of the way. Such, undoubtedly, is the general rule of navigation, but it is subject to the qualification that it does not apply in such a case when a departure from it is necessary to avoid immediate danger. 18 Stat. at L., 61.

Two answers are made by the libelants to that defense, either of which, if found to be true, is sufficient to exonerate the schooner from the consequences of the accusation, if proved to be well founded: (1) That the evidence invoked for the purpose does not establish the charge. (2) That the schooner made no change in her course until the collision was inevitable, nor until it became indispensably necessary in order to avoid immediate danger caused by the fault of the steamer.

1. All must admit that the burden to establish the charge is upon the claimants. They examined witnesses belonging to the steamer to support the theory of the defense, but the remark is applicable to them all, that their cross-examination showed that they had no actual knowledge upon the subject; that they inferred that the charge was true from the fact that the two vessels collided, and from the manner in which they came together.

On the other hand, all the persons on the deck of the schooner were examined by the libelants and they testify, with one accord, that the schooner did not change her course as alleged by the claimants. Two of those, to wit: the wheelman and the master who stood by his side, must know what did take place in that regard, and unless they have willfully stated what they know to be false their statements must be correct; nor can it be denied that they state, in the most positive terms, that the charge is untrue. They were on the deck of the schooner and had the opportunity to know everything which occurred around them; nor can they well be mistaken in respect to the matter in question; but the witnesses on the steamer only infer what transpired on the deck of the schooner, and of course their statements are in the nature of opinions, and are certainly entitled to much less credit than such as are founded in actual knowledge of what did take place.

Mere inference from the circumstances of the collision is not reliable, since it is fully proved that the steamer attempted in the first place to go to the left and then ported her helm and attempted to go to the right; nor is it correct to suppose that the angle of the steamer when she struck the port side of the schooner was towards the stem of the schooner, as the proof is quite satisfactory that it was towards the stern.

Some of the witnesses state that the steamer struck the schooner at right angles; but the better opinion is that it was with a slight angle in

the opposite direction from that found by the district judge, if his opinion is correctly exhibited in the record. Strong confirmation of that view is derived from the conceded fact that it was the port side of the stem of the steamer that was injured by the concussion. She cut three or four feet into the schooner just forward of her main rigging, and being herself injured on the port side of her stem, the inference is a reasonable one that she was heading somewhat towards the stern of the schooner.

2. Be that as it may, it still is insisted by the claimants that the schooner changed her course and violated the sailing rule which forbids it, but the evidence is not sufficient to establish the charge nor to render it probable that anything of the kind occurred, unless, perhaps, at the moment before the collision, when the master, seeing that the peril was impending, took the wheel from the helmsman and gave the order "Let go her gaff topsail sheet and lower the peak;" but the order was not obeyed, as there was no time to execute it before the steamer struck the schooner.

Rules of navigation continue to be applicable as long as the means and opportunity remain to avoid the danger, but they do not apply to a vessel required to keep her course after the wrongful approach of the opposite vessel is so near that the collision is inevitable. Steamers, under the rule that they shall keep out of the way, must, of necessity, determine for themselves and upon their own responsibility, independent of the sailing vessel, whether it is safer to go to the right or left or to slacken their speed or stop and reverse, and in order that the steamer may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required that the sailing vessel shall keep her course and allow the steamer to pass either on the right or left, or to adopt such other measures of precaution as she may deem best suited to enable her to perform her duty and fulfill the requirement to keep out of the way.

These rules of navigation are of great importance, but they do not apply to the vessel required to keep her course after the wrongful approach of the steamer is so near that the collision is inevitable; nor will an error committed by the sail vessel under such circumstances of peril, if she is otherwise without fault, impair the right of the sail vessel to recover for the injuries occasioned by the collision, for the plain reason that those who produced the peril and put the sail vessel in that situation are chargeable with the error and must answer for the consequences. *Steamship Co. v. Rumball*, 21 How., 883 [62 U. S., XVI., 148].

Subject to that exception, the sail vessel must keep her course; but the case before the court, if any change was made in the course of the schooner, falls within the exception, and it follows that the decree of the circuit court must be reversed, with costs, and the cause remanded with directions to enter a decree in favor of the libelants for the whole value of the schooner, her freight and cargo.

Decree reversed.

Cited—2 Flipp., 161.

CHESTER A. ARTHUR, COLLECTOR OF THE
PORT OF NEW YORK, *Plff. in Err.*,

v.

AUGUSTE RICHARDS AND WILLIAM E.
ISELIN.

(See 8 C., "*The Collector v. Richards*," 23 Wall., 246-261.)

Value of foreign coins—rule in invoice of imported goods—value of the franc.

1. Under the Act of 1873, the value of foreign coins in United States money, is measured by the amount of pure metal contained therein when of standard value; that is, when of the weight and fineness required by the laws and regulations of the country where they are produced.

2. Such value, when ascertained and published by the Superintendent of the Mint and the Secretary of the Treasury, becomes the rule in all cases where the estimation of the value of foreign moneys is required by law, and is the rule in estimating the invoice values of imported goods chargeable with *ad valorem* duties.

3. Computed in this manner, the value of the franc is ascertained to be nineteen cents and three mills.

[No. 549.]

Argued Dec. 9, 1874. Decided Jan. 18, 1875.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. G. H. Williams, Atty-Gen., and C. H. Hill, Asst. Atty-Gen., for plaintiff in error.

Messrs. Wm. M. Evarts and Sidney Webster, for defendants in error.

Mr. Justice Bradley delivered the opinion of the court:

This was an action at law, brought to recover from the defendant, Collector of the Customs at the Port of New York, who is the plaintiff in error, an alleged excess of duties on imported goods, exacted by the defendant and paid by the plaintiffs under protest. Judgment was given in favor of the plaintiffs, and to reverse this judgment this writ of error is brought. The case upon which the ruling complained of was made, was substantially as follows:

On the 16th day of March, 1874, the plaintiffs entered at the custom-house an invoice of goods imported from France, the value of which was invoiced in francs of the currency of France. By an Act of Congress, passed May 22, 1846, section 1, 9 Stat. at L., p. 14, it was provided that "In all computations at the custom-house, the franc of France and of Belgium shall be estimated at eighteen cents six mills." At this rate of estimation of the French franc, in money of account of the United States, which was contended for by the plaintiffs, the dutiable value of these goods was less than twenty cents per square yard and, therefore, subject to an *ad valorem* duty of thirty five per cent. and an additional duty of six cents per square yard.

On the other hand, the defendant relied on the Act passed March 3, 1873, entitled "An Act to Establish the Custom-House Value of the Sovereign or Pound Sterling of Great Britain, and to Fix the Par of Exchange," 17 Stat. at L., p. 602, by which it is enacted as follows:

"Section 1. That the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value, and the values of the standard coins in circulation of the various nations of the world, shall be estimated annually by the Director of the Mint, and proclaimed on the first day of January by the Secretary of the Treasury.

Sec. 2. That in all payments by or to the Treasury, whether made here or in foreign countries, when it becomes necessary to compute the value of the sovereign or pound sterling, it shall be deemed equal to \$4.8665, and the same rule shall be applied in appraising merchandise imported, when the value is by the invoice in sovereigns or pounds sterling; and in the construction of contracts payable in sovereigns or pounds sterling, and this valuation shall be the par of exchange between Great Britain and the United States, and all contracts made after the first day of January, 1874, based on an assumed par of exchange with Great Britain, of fifty four pence to the dollar, or \$4.44 to the sovereign or pound sterling, shall be null and void.

Sec. 3. That all Acts and parts of Acts inconsistent with these provisions, be, and the same are hereby repealed."

Under this Act the Superintendent of the Mint prepared two tables, one showing the standard value of foreign coins and moneys of account according to the amount of pure metal contained therein, as provided in the 1st clause of section 1, and the other showing the weight, fineness and value of certain foreign coins in actual circulation, as assayed at the Mint, exhibiting a slight diminution of the values contained in the first table. The Secretary of the Treasury, by a circular letter addressed to the Collectors of the Customs, declared that the value contained in the first of these tables would be used in the computation of customs and duties from and after the first of January, 1874. This made the value of the franc nineteen cents and three mills, which carried the dutiable value of the plaintiff's goods above twenty cents per square yard, and subjected them, in consequence, to an *ad valorem* duty of forty per cent. and an additional duty of eight cents per square yard. The defendant required the plaintiffs to pay duties in accordance with this latter valuation.

The court decided that the case was to be governed by the Act of 1846, 9 Stat. at L., 14, and that the Act of 1873, 17 Stat. at L., 602, does not cover or embrace it. The correctness of this decision is now before us for review.

Of course the Act last in date must prevail if it covers the case. Its language is, therefore, to be carefully examined. The important words of the 1st section are as follows:

"The value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value."

The plain meaning of this language is, that the value of foreign coins, in United States money, shall be measured by the amount of pure metal contained therein when of standard value; that is, when of the weight and fineness required by the laws and regulations of the country where they are produced. This value having been duly ascertained and published by

as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value, and the values of the standard coins in circulation of the various nations of the world, shall be estimated annually by the Director of the Mint, and proclaimed on the first day of January by the Secretary of the Treasury.

Sec 23 WALL.

the Superintendent of the Mint and the Secretary of the Treasury, becomes the rule in the cases and for the purposes to which, according to the fair meaning of the Act, it is to be applied. In what cases and to what purposes it is to be applied is not expressed by the statute, but is to be gathered from its general terms, from the context and from an examination of other statutes passed *in pari materia*. The government contends that it is to be applied in all cases where the estimation of the value of foreign moneys of account is required by law; and that its principal and, perhaps, most important purpose, is the very one in question, namely: the estimation of the invoice values of imported goods chargeable with *ad valorem* duties.

This would seem to be, *prima facie*, the correct construction of the Act. The 2d section proceeds, at once, without any inquiry of the Director of the Mint, or any further investigation of the subject, to adopt this very method of computing the value of the sovereign or pound sterling, the most important foreign coin with which the financial operations of this country are concerned, and to direct that such computation shall be applied to the valuation of invoices of imported goods, and to other specified cases in which the value of the pound sterling is necessary to be ascertained. The value of the sovereign or pound sterling, fixed by this section is \$4.8665. This is precisely its standard value computed in reference to the amount of pure metal contained in it when of standard value according to the mint regulations of England, and estimating that metal according to the amount contained in the United States dollar. Although the sovereign, or pound sterling, as a coin, has only existed since the year 1717, the amount of pure gold contained in the pound sterling (estimating the guinea at 21 shillings) has been 113.001 grains ever since the year 1717; and as the United States dollar contains 23.22 grains of pure metal, it only requires a process of simple division to show that the value of the sovereign is precisely what the 2d section of the Act determines it to be. This intrinsic value of the pound sterling, as represented by the gold coins of England, was a matter of such public notoriety as to need no extraneous inquiry on the subject. It was the public law of the British Empire during the period of our own colonial history, of which all our courts were required to take judicial notice; and its continuance to the present time is a public fact as well established as any other Act of the British Government. In addition to this, the Finance Committee of the Senate, in reporting the Act of 1873, stated the value of the pound sterling, computed in the manner referred to, as an ascertained fact. There were also other reasons, if any were needed, having respect to the fictitious par of exchange so long persisted in by the bankers of both countries, which made it expedient for Congress itself to fix the value of the pound sterling. But the material fact in this inquiry is, that it fixed that value on precisely the same principle which it is claimed by the government is laid down in the 1st section for ascertaining the value of all other foreign coins, and specified the purposes to which such valuation should be applied, amongst which is that of computing the value of invoices of imported goods. And it seems to us clear that the two sections have, in this re-

gard, substantially the same objects in view; that it was the object of the 1st section to establish a method of computing the value of other foreign coins, similar to that employed in the 2d section in computing the value of the sovereign, and to apply such computation in the same cases and for the same purposes. Otherwise, there would exist two differing methods of computing the values of foreign coins, and two differing rules for estimating the values of goods imported from different countries, giving a different value to goods imported from one country from that given to goods of the same cost imported from another country.

And it seems to us (although that is a matter of legislative cognizance) that the statute adopts the true method of computing the value of foreign money. The basis of our dollar of account (when not affected by the exceptional condition of legal tender notes) is the standard gold dollar of 25.8 grains, containing one tenth alloy. The actual coinage in circulation may be slightly diminished in value by abrasion, and this may have some effect on the dollar of account. But the same thing is true in other countries as the assays at the mint have shown; and the true method of comparing their money of account with ours, when both are based on actual coin, is to compare the standard coins of the two countries in a perfect state, and to ascertain the actual amount of pure metal in each. This is the result at which Congress seems to have arrived and, as we think, wisely.

In making the comparison of the moneys of different countries, their gold coins, if they have such, are employed for the purpose; gold having become the general medium of international exchange, whilst silver is regarded more as a domestic coin, and is usually made a legal tender for only limited amounts. This practice, together with the rejection of the alloy from the estimate, is in accordance with the rules laid down on the subject by the most enlightened economists.

Computed in the manner required by the law the value of the franc is ascertained to be nineteen cents and three mills, as contended for by the government. This is the result of the examination and estimate made by the Director of the Mint and announced by the Secretary of the Treasury.

But the defendants in error insist that an examination of prior statutes, on the subject of coins and their valuation, demonstrates that the Act of 1873 was not intended to fix the value of the franc or of other foreign coins for the purpose of ascertaining the amount of invoices of imported goods, but for the purpose of giving general information on the subject, or of estimating the value of contracts in legal proceedings, or for some other purpose.

We have carefully examined the statutes for the purpose of ascertaining the soundness of this suggestion, but have failed to see anything in the legislation on the subject requiring us to adopt it. It is true that some of the laws have had for object simply the valuation of foreign coins for the use of the custom-house in computing the amount of invoices; others have fixed the value of such coins when receivable in payment of public dues, or when used as legal tenders in the payment of debts; and others have had still other purposes and objects. But how

this general fact can affect the express mandatory terms of the Act of 1878, we fail to perceive. Those terms are that the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value. This simple and sensible rule abrogates previous regulations on the subject. It is inconsistent with them, and the 8d section of the Act expressly repeals all Acts and parts of Acts inconsistent with its provisions. No resort to a repeal by implication is necessary.

Of course the Act of 1878 does not make foreign coins receivable in cases where they were not receivable before; but where they are receivable, or where their value is material to be known, the rule for ascertaining that value is clearly laid down and determined by the law. It is true it does not itself fix the values of foreign coins except in a single instance where special reasons require it; and it is doubtful whether the attempt to do so would have been as judicious as the method adopted. Those values are now to be carefully ascertained and publicly announced by the proper officers of the government. This method will insure the greatest accuracy, and will be attended with many public benefits. It is just, both to the government and the importer, because it is founded on truth; and it will be a great convenience to all persons who have any transactions in which the value of foreign money is in any way involved.

The judgment must be reversed, and the record remitted, with directions to the Circuit Court to award a venire de novo.

Cited—102 U. S., 615.

CHARLES M. TREMAINE ET AL., *Appts.*,

v.

ALONZO HITCHCOCK ET AL.;

AND

ALONZO HITCHCOCK ET AL., *Appts.*,

v.

CHARLES M. TREMAINE ET AL.

See 8. C., "The Tremolo Patent," 23 Wall., 518-529.)

Amendment to bill after decree—rule of damages in patent cases.

1. An amendment may be made to a bill in equity, even after a final decree, where the cause was tried precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment.

2. In an action for the unauthorized use of a patented attachment to a musical instrument, the correct rule to ascertain the profits made by defendants from the sales, is to prove the general expenses of their business incurred in affecting the sales of all musical instruments, and deduct a ratable proportion from the profits made by the sale of the attachments.

[Nos. 118, 119.]

Argued Dec. 22, 1874. Decided Jan. 18, 1875.

CROSS APPEALS from the Circuit Court of the United States for the Southern District of New York.

NOTE.—Damages for infringement of patents; treble damages. See note to Hogg v. Emerson, 52 U. S. (11 How.), 557.

See 23 WALL.

U. S., BOOK 23,

This was an action brought in the court below by Hitchcock, Saxe & Robertson, to recover damages for the alleged infringement of certain re-issued letters patent granted to the complainants as assignees of one Carpenter, for a tremolo attachment to musical instruments. The bill charged that the defendants, who are dealers in musical instruments, had infringed this patent, and also asked for an injunction. The defendants, by their answer, denied that they had infringed, alleged that the supposed invention had been anticipated by prior use, and denied that the complainants had any title to the re-issued letters patent on which the bill was brought. At the October Term, 1870, a decision was rendered in favor of the complainants and the cause was referred to a master to state the amount of profits. A report was made, exceptions were filed by the defendants, and the report was referred back with instructions. A new report was made, both parties filed exceptions, but all exceptions were overruled and the report confirmed. A final decree was entered, and the defendants appealed from the whole decree. The complainants appealed from so much of the decree as overruled the complainant's exceptions to the master's report.

The case further appears in the opinion.

Mr. Frederic H. Betts, for Hitchcock *et al.*:

To properly estimate the profits, regard must be had to the nature of the improvement in question, and the character of the business of the defendants in dealing with it. This improvement is not the fan by itself, but it is the combination of the fan with the organ in a specified location and relation. The business of the defendants was a general one. It was the sale of musical instruments. These organs were made by the manufacturers with and without the tremolo fans. The organ was complete without the fan, and it was optional with the defendant to procure it for sale or not. There was a profit, not only of the enhanced price received for the tremolo, but there was also a profit of much larger amount, beyond and besides this, on the organs themselves.

The complainants claim that, when the infringing device is an optional one and an extra price is charged and received for it when used, the true profit made is the extra sum received for the addition, only such expenses being allowed as are incurred by reason of the addition. If it be the fact, as it doubtless was, that the presence of the tremolo combination increased the sales of organs, so far from the tremolo combination being charged with anything on that account, it ought to be credited, not only with the difference between its cost and sale price, but also with the additional net profit on the whole instrument whose sale was thereby effected.

Seymour v. McCormick, 3 Blatchf., 225; *S. C.*, 19 How., 96 (60 U. S., XV., 557); *Whitney v. Mowry*, 4 Fish., 145; *Carter v. Baker*, 4 Fish., 404.

Mr. B. E. Valentine, for Tremaine *et al.*:

The court below decided that the letters patent No. 3444, on which the bill was brought, had been surrendered by the complainants before they had brought their action; but the court went on to make the additional finding, that the complainants were the owners of letters

patent No. 3665, and that those letters patent were good and valid and had been infringed. The bill of complainant was not at that time amended so as to recite the new re-issue, No. 3665, nor was any such amendment asked for; but on the coming in of the master's report, the complainants applied for judgment against the defendants. The bill of complaint never contained the allegation as to re-issue No. 3665, prior to judgment. The defendants do not come into this court asking for a decision upon the validity of the complainants' invention as secured by the patent No. 3665. Their record and proofs are not calculated to try the merits of the patent, and they desire not to prejudice the future consideration by this court of the said patent when it shall come before the court on a record calculated to test the merits of the alleged invention.

That the court below erroneously permitted the amendment of the bill, see, Equity Rules, 29 and 46 (Book XX., pp. 913, 914, this ed.); *Goodwin v. Goodwin*, 3 Atk., 370; *Walden v. Bodley*, 14 Pet., 160; *Snead v. McCoull*, 12 How., 422; *Smith v. Jackson*, 1 Paine, C. C., 430; *Donaldson v. Hazen*, Hemp., 423.

Mr. Justice Strong delivered the opinion of the court:

The bill filed by the complainants in the court below set forth that "A patent for a tremolo attachment" to musical instruments was granted on the 27th day of June, 1865, to R. W. Carpenter; that, subsequently, the patentee assigned the letters patent to the complainant; that, on the 18th day of May, 1869, they surrendered the patent and obtained a re-issue to themselves, numbered 3444, and that the defendants had been guilty of infringing their rights under the patent. To the complaint thus exhibited the defendants answered, admitting the grant of the letters to Carpenter, but denying all knowledge as to the truth of the allegation that Carpenter had at any time assigned his interest to the complainants, or to any one or more of them and, therefore, denying that the complainant had any interest in the said letters patent or to the "re-issues" of the same as set forth in the bill of complaint. The answer further averred that Carpenter was not the original inventor of the tremolo attachment, but that it was known and was in use before his alleged invention was made. Still further, the answer denied that the defendants had infringed upon the rights and privileges granted by the patent dated June 27th, 1865, "or by any of the re-issues of the same." To this answer a general replication was put in, and the parties went to trial, when the complainants gave in evidence without objection re-issued letters patent No. 3665, dated October 5, 1869, which had been granted on the surrender of the first re-issue No. 3444. This second re-issue was not set out in the bill, but it is plain both parties supposed it was through all the progress of the trial. As we have noticed, the answer denied infringement, not of the single re-issue mentioned in the bill, but of any of the re-issues. No other than No. 3665 was put in evidence. The decretal order to account expressly mentioned it. The evidence taken by the master under the order of reference, related solely to attachments sold by the de-

fendants after the second re-issue was granted. In the exceptions taken by them to the master's report, no intimation was made that the rights of the complainant under the re-issue 3665 were not on trial, and not even when the final decree was made was it suggested that the parties had been trying the case on an issue not made by the pleadings. Practically, indeed, the rights of the complainants under the second re-issue and the defendant's infringement thereof, were in issue under the answer and the replication.

We think, therefore, that the order of the court directing that the record be amended by inserting in the bill an averment of the second re-issue was properly made, under the circumstances of the case, though made after the final decree. It deprived the defendants of no rights which they had not enjoyed during all the progress of the trial. It may well be denominated only an amendment of form, because it introduced no other cause of action than that which had been tried. It is true that an amendment which changes the character of the bill ought not generally to be allowed after a case has been set for a hearing, and still less after it has been heard. The reason is that the answer may become inapplicable if such an amendment be permitted. But in this case the defendants were not prejudiced. They had every advantage they could have had, if the bill had originally averred the second re-issue. The case is undoubtedly anomalous, but we think justice would not be subserved by denying to the circuit court the power to order such an amendment as was made, after the cause was tried precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment.

We come, then, to the errors assigned by the complainants. They relate to the estimate of profits reported by the master and confirmed by the court. The defendants were vendors of musical instruments, including organs and melodeons, which they purchased from the manufacturers. Some of these instruments contained the tremolo attachment, and others did not. For those containing such attachments they paid an additional price, and they sold them also for an increased price. In the ascertainment of the profits made by them from the sales, they were allowed to prove the general expenses of their business incurred in effecting the sales of all musical instruments, and deduct a ratable proportion from the profits made by the sale of tremolo attachments. It is of this allowance the complainants now complain. It is said the patent infringed was not for the tremolo itself, but for the combination of the organ and tremolo, and it is argued that if the defendants obtained an extra price for the organ combined with the tremolo without incurring any additional expense, the whole of that extra price was obtained from the addition of the combination. And it is further insisted that the true rule in cases like the present is, that if the infringing device is an integral part of the whole instrument, without which it is incapable of use, and for which a single charge is made, then, in ascertaining profits on a part of the organization, general expenses are to be apportioned according to the cost or by some other equitable rule. But when the infringing device

is an optional one, used or not at pleasure, and an extra price is charged and received for it when used, the true profit made is the extra sum received for the addition, deducting only such expenses as are incurred by reason of the addition. We think such a rule, even if it may sometimes be just, is inapplicable to the present case. We cannot see why the general expenses incurred by the defendants in carrying on their business, such expenses as store rent, clerk hire, fuel, gas, portage, etc., do not concern one part of their business as much as another. It may be said that the selling a tremolo attachment did not add to their expenses, and, therefore, that no part of those expenses should be deducted from the price obtained for such an attachment. This is, however, but a partial view. The store rent, the clerk hire, etc., may, it is true, have been the same, if that single attachment had never been bought or sold. So it is true that the general expenses of their business would have been the same, if instead of buying and selling one hundred organs, they had bought and sold only ninety-nine. But will it be contended that because buying and selling an additional organ involved no increase of the general expenses, the price obtained for that organ above the price paid was all profit? Can any part of the whole number sold be singled out as justly chargeable with all the expenses of the business? Assuredly, no. The organ with a tremolo attachment is a single piece of mechanism, though composed of many parts. It was bought and sold as a whole by the defendants. It may be said the general expenses of the business would have been the same if any one of these parts had been absent from the instrument sold. If, therefore, in estimating profits, every part is not chargeable with a proportionate share of the expenses, no part can be. But such a result would be an injustice that no one would defend. We think it very plain, therefore, that there was no error in the rule adopted for the ascertainment of the profits made by the defendants out of their infringement of the complainants' patent.

We think also the master's report, confirmed by the court, was correct in its ascertainment of the general expenses. At least there is nothing before us to show that it did not conform to the second decretal order. The defendants submitted analyses of their books, from which it is to be presumed the master distinguished general from particular expenses.

It follows that neither the appeal of the defendants nor the cross appeal of the complainants can be sustained.

The decree of the Circuit Court is affirmed; and it is ordered that the costs of each appeal be paid by the appellants.

JOHN B. SCHOLEY, *Plff. in Err.*,

v.

FRANCIS S. REW.

(See S. C., 23 Wall., 831-852.)

Succession tax—valid Act—capitation tax—alienage.

1. Where one took, under his wife's will, an equitable interest in one third of certain real estate, he is liable to pay a succession tax or duty in respect to the same by virtue of the Internal Revenue Act of 1864, as amended in 1866.

See 23 WALL.

2. The Act imposing the duty is constitutional and valid. The tax or duty levied by the Act is not a direct tax, but is an excise tax or duty, authorized by section 8 of article 1 of the Constitution.

3. Such a tax or duty is neither a tax on land nor a capitation exaction, although it is made a lien upon the land, to secure its collection.

4. Where the devise was to the plaintiff, and he has claimed the benefit of it without opposition, and continued to enjoy its use to the present time, he is estopped to set up alienage as a ground of recovering back the tax paid on such succession.

[No. 138.]

Argued Jan. 12, 1875. Decided Jan. 25, 1875.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Mr. Theodore Bacon, for plaintiff in error:

I. The statute imposing this duty is unconstitutional and void, being within the prohibition in article 1, section 9, par. 4, of the Constitution.

The tax is a direct tax, within all the decisions upon this subject, and it is not in proportion to the census.

The opinions in the famous carriage tax case, *Hylton v. U. S.*, 3 Dall., 171, while narrowing down to the utmost the constitutional restriction, one after another distinctly recognized a tax on land, as the only direct tax contemplated by the Constitution, except a capitation tax. Per Chase, *J.*, p. 175; per Patterson, *J.*, p. 177; per Iredell, *J.*, p. 183.

These views are approved in *Pacific Ins. Co. v. Soule*, 7 Wall., 444, 445 (74 U. S., XIX., 98, 99); see, also, 1 Story, Const., sec. 955; *Veazie Bank v. Fenno*, 8 Wall., 533 (75 U. S., XIX., 482); per Chase, *Ch. J.*, 542-546 (75 U. S., XIX., 486, 487).

The present is a tax on land, if ever one was. No doubt it is to be paid by the owner of the land, if he can be made to pay it; but that is true of any tax that ever was or ever can be imposed on property. And as if to prove how directly the property and not the property owner is aimed at, the duty is made a specific lien and charged upon the land in respect whereof it is assessed. 13 Stat. at L., 290, secs. 145, 146.

More than this, as if to show how identical, in the opinion of Congress, this duty was with the avowedly direct tax upon lands which it had levied but a year or two before, it enacts that this succession tax alone, out of a great revenue system filling 182 sections, should be collected by the same officers, in the same manner and by the same processes, as direct taxes upon land under the authority of the United States.

NOTE.—Effect of alienage as to title to real estate. See note to *Gouverneur v. Robertson*, 24 U. S. (11 Wheat.), 332.

Direct taxes.

Direct taxes include only capitation taxes and taxes on lands. *Hylton v. U. S.*, 3 U. S. (3 Dall.), 171; *Loughborough v. Blake*, 18 U. S. (5 Wheat.), 317; *Veazie Bk. v. Fenno*, 75 U. S. XIX., 482; *License Tax Cas.*, 72 U. S. XVIII., 497, 675; 1 Kent, Com., 254; Story, Const., sec. 950.

Direct taxes do not include a tax on notes of state banks nor on incomes (*Pacific Ins. Co. v. Soule*, 74 U. S., XIX., 95; *Veazie Bk. v. Fenno*, 75 U. S., XIX., 482; *Clark v. Sickel*, 14 Int. Rev. Rec., 6); nor the tax on the business of an insurance company (*Pacific Ins. Co. v. Soule*, 74 U. S., XIX., 95; nor a tax on carriages kept for private use (*Hylton v. U. S.*, 3 U. S., 3 Dall., 171); nor a tax on the gross receipts of a railroad company. *State v. Phila. & C. R. R. Co.*, 45 Md., 361; S. C., 24 Am. Rep., 511.

Sec. 150., p. 291.

II. Considering the Act as valid, statutes in derogation of rights of property, or that take away the estate of a citizen, or which levy an excise or tax upon him, must be construed strictly.

Sharp v. Speir, 4 Hill, 76; *Hubbard v. Johnstone*, 3 Taunt., 220, 221; *Denn v. Diamond*, 4 B. & C., 243; *Sewall v. Jones*, 9 Pick., 412; see, also, *Mayor, etc., v. Hartridge*, 8 Ga., 30; *Bank of Ga. v. Mayor, etc.*, Dudley, 132; *Atty-Gen. v. Bank of Newbern*, 1 Dev. & B. Eq., 218, per Ruffin, Ch. J.; *Adams v. Bancroft*, 3 Sumn., 384, 387, per Story, J.; *U. S. v. Watts*, 1 Bond, 580, 583.

III. This is such a statute; besides that, it levies a most oppressive tax; it is highly penal upon any who do not submit to official interpretation of its provisions (sec. 148, p. 291); and it subjects the real estate affected by it to a lien for the amount of the tax into whosoever hands it may pass. Sec. 145, p. 290.

But we do not ask that specially strict rules of construction be applied. We ask only that the statute be not extended by construction to a case not clearly within its terms.

IV. This case is not within the Act.

1. There has been no "devolution of title to any real estate" sec. 126, either upon the plaintiff or upon anyone else. And this is the statutory definition of a "succession."

2. The plaintiff has not become beneficially entitled in possession or expectancy, to any real estate, or the income thereof. Sec. 127.

3. The orders of the Supreme Court of New York, obtained *ex parte*, assuming to authorize the acting executor of Elwood's will to invest certain funds in this block, were wholly without effect, except as being a sort of evidence of good faith in the executors in making the investment. The beneficiaries under the will were still entitled to hold them to account for the personalty which came to their hands, and if the investment should prove unprofitable, to deny the propriety of it and compel them to respond for the amount invested, as upon an abuse of their discretion.

4. But conceding the right of the executors to make the investment, whether judicious or not and whether strengthened or not by the order of the court, their right and duty would be certainly no less clear to sell the property again and reconvert it into government stocks or bonds and mortgages, if at any time they should be of opinion that the preservation of the fund demanded such change.

If Mrs. Scholey had died intestate, it is expressly adjudicated that her interest in the Elwood estate, except so far as it was realty at the time of Elwood's death, would have passed as assets to her administrator, instead of descending to her heirs.

Rogers v. Paterson, 4 Paige, 409; *Gibson v. Scudamore*, 1 Dick., 45; *Witter v. Witter*, 3 P. Wms., 99; *Winchelsea v. Norcliffe*, 1 Vern., 485; *Awdley v. Awdley*, 2 Vern., 192.

Messrs. Geo. H. Williams, Atty-Gen., and C. H. Hill, Asst. Atty-Gen., for defendant in error:

The construction always given to these clauses of the Constitution indicates that the only taxes which the Constitution regards as direct taxes are capitation taxes and taxes imposed immediately on land, which are capable of being apportioned without producing any great inequality

or injustice, and that the term does not include all taxes that political economists might regard as direct taxes.

Hylton v. U. S., 3 Dall., 171; *Pacific Ins. Co. v. Soule*, 7 Wall., 433, 446 (74 U. S., XIX., 95, 99); *Veazie Bank v. Fenno*, 8 Wall., 533, 546 (75 U. S., XIX., 482, 487); 7 Hamilton's Works, 845; Kent, Com., 254; 1 Story, Const., sec. 954, *et seq.*

A succession tax is not a direct tax to any greater extent than the income tax, which was held by Mr. Justice Strong in the Third Circuit, to be constitutional and valid.

Clark v. Sickles, 14 Int. Rev. Rec., 6; see, also, *The Savings Bank cases, Soc. for Sav. v. Coite*, 6 Wall., 594 (73 U. S., XVIII., 907); *Prot. Inst. v. Mass.*, 6 Wall., 611 (73 U. S., XVIII., 897).

If the Supreme Court had jurisdiction to authorize the investment of the personal estate of Isaac R. Elwood, in the purchase of real estate by the executors, its decree in the premises was in the nature of a proceeding *in rem*, and bound all persons interested therein; and there is nothing in the record to show that its jurisdiction was not complete.

Comstock v. Crawford, 3 Wall., 396 (70 U. S., XVIII., 34); *Blount v. Darrach*, 4 Wash. (C.C.) 657; *Foraythe v. Ballance*, 6 McLean, 562; *Merriam v. Sewall*, 8 Gray, 316; *Denny v. Mattoon*, 2 Allen, 374, 376.

If the plaintiff in error, under the will of his wife, acquired an interest in the Elwood block, the subsequent partition, whereby this entire estate was set off to the heirs of Elwood, does not relieve him from liability to pay a succession tax in respect of his share of it. He received its full value in other property.

Mr. Justice Clifford delivered the opinion of the court:

Properties, rights, interests and credits of almost every description were made subject to an internal duty or tax by the Act of the 30th of June, 1864; and the same Act provided that every past or future disposition of real property by will, deed or descent, by reason whereof any person becomes beneficially entitled in possession or in expectancy, in any real estate or the income thereof, upon the death of any other person dying after the passage of that Act, shall be deemed to confer on such person so entitled a succession. Successions of a different character are also defined by several succeeding sections of the Act, and the Act also provides that there shall be levied and paid to the United States, in respect of every such succession, certain prescribed duties according to their value and the scale therein enacted. 13 Stat. at L., pp. 287, 288.

Pursuant to that provision, the plaintiff was assessed in the form of a succession tax or duty of six per cent. upon \$45,000, as the value of one third interest in a certain stone block situated and described as set forth in the record, and it also appears that the plaintiff having first appealed to the Commissioner for redress without success, brought an action of *assumpsit* in the circuit court against the defendant as collector to recover back the amount. Service was made, and the parties appeared and waived a jury, and finally submitted the case to the court upon an agreed statement of evidence, which is

embodied in the bill of exceptions as findings of the court. Hearing was had and the court rendered judgment for the defendant and the plaintiff sued out a writ of error and removed the cause into this court.

Real estate of great value and personal property to a large amount belonged to the former husband of the wife of the plaintiff, and the finding of the circuit court shows that the owner of the property died in February, 1863, leaving a last will and testament; that, by the will he bequeathed certain sums of money and certain personal property to his three children, and a certain other sum to one other person, and then directed that all the rest and residue of his estate, real and personal, should be divided and distributed between his wife and his son and daughters, all of whom survived him, according to the provisions of the statutes of the State, in the same manner as though he had died intestate. His wife and two other persons were therein named as executors, and letters testamentary were duly issued to them under the will.

Application was subsequently made to the Supreme Court of the State by one of these persons, representing himself in the application as the acting executor, for leave to invest certain moneys belonging to the estate of the decedent in real estate, and it appears that the court first reciting the substance of the petition, passed an order that the executrix and the executors named in the will be, and they are hereby authorized and empowered to invest of the assets of the estate which now are, or shall hereafter come into their hands, so much as they shall deem necessary for the interest of the estate in the purchase of the real estate referred to in the petition, upon such terms and to such amount as in their judgment shall be prudent, and to do all and every other act and thing necessary to enable them to acquire and perfect their title to the property; that the executors, by virtue of that order, purchased the block described in the petition, and that the owner of the premises conveyed the same to the executrix and executors, the survivor or survivors of them, their executors and assigns.

Four several parcels of real estate belonged to the testator at his decease, one of which was a vacant lot, the whole being of the value exceeding \$50,000. Improvements were also made on the premises purchased by the executors to an amount exceeding \$49,000, and they also erected a building on the vacant lot, which cost more than \$15,000, and the findings of the court show that the improvements made on the block purchased, increased its value to an amount equal to the expenditure, and that the consideration of the property purchased and the whole expenditure for the improvements made were, by the direction of the state court, paid out of the personal property belonging to the estate of the testator.

Beyond all doubt the investment so made was approved by the executrix, and it is not questioned that it was done prior to her second marriage and under the license of the Supreme Court of the State, nor that she subsequently married the plaintiff, and that she died in September, 1880, leaving a last will and testament, which was duly admitted to probate. By her will she bequeathed life annuities to five

several legatees, amounting in the aggregate to the sum of \$4,100, and she also bequeathed certain articles of personal property specifically, and several sums of money, amounting to \$6,500; and she bequeathed all the rest, residue and remainder of her estate, both real and personal, to the plaintiff, and appointed him, with two other persons, executors of the will.

Questions of importance were discussed at the bar, some of which it cannot be admitted are properly presented for decision. Such questions only as are specified in the assignment of errors are, in general, to be regarded as open to the plaintiff, and it is very doubtful whether an assignment that the decision of the circuit court is for the wrong party is sufficient to present any question for decision; but inasmuch as the findings of the court in this case are in their nature a special finding, the better opinion is that their sufficiency to support the judgment is open to re-examination.

Enough has already appeared to show that the plaintiff took under his wife's will an equitable interest in one third of the estate in question, and the United States contend that in view of those facts he is liable to pay a succession tax or duty in respect of the same by virtue of the Act passed to levy such taxes, as it applies to every past or future disposition of real estate by will, deed or laws of descent, by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate, or the income thereof, upon the death of any person dying after the passage of that Act.

Apply the rule to be deduced from that enactment to the facts found by the court, and it must follow that the argument of the United States is well founded, unless some one or more of the special objections to the tax set up by the plaintiff are sufficient to exonerate him from such liability. Those objections are as follows: (1) That the Act imposing the duty is unconstitutional and void. (2) That the case is not one within the Act imposing the tax or duty. (3) That the plaintiff being an alien, the devise to him is absolutely void.

1. Support to the first objection is attempted to be drawn from that clause of the Constitution which provides that direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers; and also from the clause which provides that no capitation or other direct tax shall be laid, unless in proportion to the census or amended enumeration; but it is clear that the tax or duty levied by the Act under consideration is not a direct tax within the meaning of either of those provisions. Instead of that it is plainly an excise tax or duty, authorized by section 8 of article 1 which vests the power in Congress to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare.

Such a tax or duty is neither a tax on land nor a capitation exaction, as subsequently appears from the language of the section imposing the tax or duty, as well as from the preceding section, which provides that the term "succession" shall denote the devolution of real estate, and the section which imposes the tax or duty also contains a corresponding clause which pro-

vides that the term "successor" shall denote the person so entitled, and that the term "predecessor" shall denote the grantor, testator, ancestor or other person from whom the interest of the successor has been or shall be derived.

Successor, is employed in the Act as the correlative to predecessor, and the succession or devolution of the real estate is the subject-matter of the tax or duty, or, in other words, it is the right to become the successor of real estate upon the death of the predecessor, whether the devolution or disposition of the same is effected by will, deed or laws of descent, from a grantor, testator, ancestor or other person from whom the interest of the successor has been or shall be derived; nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction.

Indirect taxes, such as duties of impost and excises and every other description of the same, must be uniform, and direct taxes must be laid in proportion to the census or enumeration as remodeled in the Fourteenth Amendment. Taxes on lands, houses and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category; but it never has been decided that any other legal exactions for the support of the Federal Government fall within the condition that, unless laid in proportion to numbers, that the assessment is invalid. *Hylton v. U. S.*, 3 Dall., 171; 1 Kent, Com., 12th ed., 255; Story, Const., sec. 955.

Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy. *Ins. Co. v. Soule*, 7 Wall., 446 [74 U. S., XIX., 99]; *Bk. v. Fenno*, 8 Wall., 546 [75 U. S., XIX., 487]; *Clark v. Sickel*, 14 Int. Rev. Rec., 6.

Neither duties nor excises were regarded as direct taxes by the authors of the *Federalist*. Objection was made to the power to impose such taxes, and in answering that objection Mr. Hamilton said that the proportion of these taxes is not to be left to the discretion of the National Legislature, but it is to be determined by the numbers of each State, as described in the 2d section of the 1st article. An actual census or enumeration of the people must furnish the rule, a circumstance which shuts the door to partiality or oppression. * * * In addition to the precaution just mentioned, said he, there is a provision that all duties of imposts and excises shall be uniform throughout the United States. *Federalist*, No. 36, p. 161; 7 Hamilton's Works, 847; *License Tax Cases*, 5 Wall., 462 [72 U. S., XVIII., 497].

Exactions for the support of the Government may assume the form of duties, imposts or excises, or they may also assume the form of license fees for permission to carry on particular occupations or to enjoy special franchises, or they may be specific in form, as when levied upon corporations in reference to the amount of

capital stock or to the business done or profits earned by the individual or corporation. *Cooley*, Const. Lim., 495; *Proc. Inst. v. Massachusetts*, 6 Wall., 625 [73 U. S., XVIII., 911]; *Bk. v. Apthorp*, 12 Mass., 253.

2. Sufficient appears in the prior suggestions to define the language employed and to point out what is the true intent and meaning of the provision, and to make it plain that the exaction is not a tax upon the land, and that it was rightfully levied, if the findings of the court show that the plaintiff became entitled, in the language of the section, or acquired the estate or the right to the income thereof by the devolution of the title to the same, as assumed by the United States.

Doubt upon that subject, it would seem, cannot be entertained if it be conceded that the subject-matter of the assessment is the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy, under the circumstances and conditions specified in the other parts of the section.

Decided support to the proposition that such is the true theory of the Act is derived from the fact that the Act of Parliament from which the particular provision under discussion was largely borrowed has received substantially the same construction. *Wilcox v. Smith*, 4 Drew. Ch., 49; *Blythe v. Granville*, 13 Sim., 195; *Atty Gen. v. Middleton*, 3 Hurlst. & N., 136; *Atty-Gen. v. Fitz John*, 2 Hurlst. & N., 472; *Atty-Gen. v. Gardner*, 1 Hurlst. & C., 649; *Atty-Gen. v. Gell*, 3 Hurlst. & C., 629; *Braybrooke v. Atty-Gen.*, 9 H. L. Cas., 165; *Lyall v. Lyall*, L. R., 15 Eq., 11; *Jeyes v. Shadwell*, L. R., 1 Ch. App., 1; *In re Badarts Trusts*, L. R., 10 Eq., 296.

Suppose that to be the true construction of the Act imposing the duty, and it is undeniable that the case before the court falls within its operation, unless the fact that the plaintiff is an alien exonerates him from such an exaction. Proof of the introductory proposition is found in the conceded fact that the testatrix in her lifetime invested the personal property left her by the will of her first husband, or some part of it, in the said real estate, and that the plaintiff became entitled to the same or to the income of one third of the same at her decease and, consequently, became liable to pay the succession tax or duty in question unless he is exempted from the liability by his alienage.

He does not deny that the investment of the personal property in the manner stated was made by the executrix and her associates, under the decree of the Supreme Court of the State, nor does he attempt to impugn the regularity or the validity of those proceedings, nor is there anything in the record that would enable him to do so with success if the attempt was made. Proceedings, it is true, were instituted to effect a partition of the estate of the testatrix, and it is equally true that those proceedings were carried forward to final judgment, from which it appears that the entire block, in respect of which the controversy has arisen, was set off to the heirs of his deceased wife, but it is clear that that circumstance cannot relieve him from liability to pay a succession tax in respect to his share of the estate, for the obvious reason that he received its full value in other property assigned to him belonging to the same estate.

Beyond what may be inferred from the finding of the court, that the plaintiff is an alien, it does not appear that the defense of alienage was set up in the court below, nor does the assignment of errors contain any specification of such a question, except that the plaintiff is not liable to a succession tax and that the decision of the court below that he is so liable is erroneous. Such an assignment is not a compliance with the rule upon that subject, but the court is not inclined to rest the decision upon that ground.

Admit that the question is open, still the court is of the opinion that it cannot avail the plaintiff in this case, even under the comprehensive provision of the state statute. By that statute it is enacted that every devise of any interest in real property to a person who, at the time of the death of the testator, shall be an alien, not authorized by statute to hold real estate, shall be void. 2 R. S. (N. Y.), 58.

Nothing appears in the record of an express character to show that the plaintiff was ever authorized by statute to hold real estate, but it does appear that he claimed a one third interest in the block in respect of which the succession tax was levied, and that his claim was recognized by the court and all the parties in the partition suit, and that the same was finally adjudged to him in the judgment of partition by allowance for the value in other property left by the testatrix; nor can it make any difference that the corresponding allowance to him was of personal property, never converted into real estate, as the record of the proceedings in partition shows that the referees, whose report was confirmed and adopted by the court, adjusted the amounts as if the block was personal property, probably for the reason that the consideration of the same at the time of the investment was paid out of the personal property left by the former husband of the testatrix.

Difficulty, it may be admitted, would attend the solution of the question if the issue was one between the plaintiff and the heirs at law of the testatrix, but the record shows that the testatrix became the owner of the property in the manner before stated, and that the interest claimed by the plaintiff was devised to him by the actual owner, and that he claimed it as if entitled to it under the will of the testatrix, and that he received one third part of the income of the same from her decease to the commencement of the suit for partition, and that the claim made by him was fully recognized and included in the judgment of partition, and nothing is shown to support the theory that he is not still in the undisputed enjoyment of the allowance made to him in substitution for the one third interest of the estate in respect of which the succession tax was levied.

Except for the purpose of avoiding the tax or duty due to the United States he has always claimed the benefit of the devise and still claims it for every other purpose. Had he disclaimed the right to take the interest devised to him, the actual devolution of the estate would have given the right of possession to the heirs, either by the will or by the law of descent, and in that event the United States would not have met with any embarrassment in levying and collecting the succession tax or duty. By the terms of the will the devise was to the plaintiff, and inas-

much as he claimed the benefit of it without opposition, and has continued to enjoy its use, as before explained, to the present time, it followed that the heirs could not be subjected to such an exaction.

Tested by these suggestions, it is clear that the claim of the plaintiff to recover back the amount of the tax or duty is inequitable, and in that regard the court here concurs in the proposition submitted by the United States, that the plaintiff is estopped to set up alienage as a ground of recovery under the circumstances of this case. *Swain v. Seamans*, 9 Wall., 273 [76 U. S., XIX., 560]; *Pickard v. Sears*, 6 Ad. & Ell., 474; *Freeman v. Cooke*, 2 Exch., 654; *Foster v. Dauber*, 6 Exch., 854; *Edwards v. Chapman*, 1 Mees. & W., 281; *Bigelow, Estop.*, 378; *Hyde v. Baldwin*, 17 Pick., 303.

Having accepted the beneficial interest under the will, and being in the undisturbed enjoyment of the same, he must bear the burden which legally attaches to the interest.

Judgment affirmed.

Cited—102 U. S., 601.

THE CHICAGO & ALTON R. R. CO.,

Plff. in Err.,

v.

HENRY C. WISWALL.

(See S. C., 23 Wall., 507-508.)

Final judgment, what is not—mandamus.

1. The order of the circuit court remanding a cause to the state court for want of jurisdiction is not a "final judgment" in the action, but a refusal to hear and decide.

2. The remedy in such a case is by *mandamus* to compel action, and not by writ of error to review what has been done.

[No. 572.]

Submitted Jan. 18, 1875. Decided Feb. 1, 1875.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois. On motion to dismiss.

This case arose in a state court of Illinois, and was removed to the court below. Subsequently the court below decided that it had no jurisdiction of the case, and made an order remanding it again to the state court. From that decision this writ of error was taken.

The case is sufficiently stated by the court.

Mr. John W. Ross, for defendant in error.

Mr. P. Phillips, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The writ of error in this cause is dismissed upon the authority of *Ins. Co. v. Comstock*, 16 Wall., 270 [83 U. S., XXI., 498]. The order of the circuit court remanding the cause to the state court is not a "final judgment" in the action, but a refusal to hear and decide. The remedy in such a case is by *mandamus* to compel action, and not by writ of error to review what has been done. *King v. Justices of Gloucestershire*, 1 Barn. & Ad., 1; 1 Chitty, Gen. Pr.,

NOTE.—What is "final decree" or judgment of state or other court, from which appeal lies. See note to *Gibbons v. Ogden*, 19 U. S. (6 Wheat.), 448.

786; *Ex parte Bradstreet*, 7 Pet., 647; *Ex parte Newman*, 14 Wall., 165 [81 U. S., XX., 879].

Cited—94 U. S., 5; 103 U. S., 610; 105 U. S., 579; 106 U. S., 556; 111 U. S., 798.

FRANK J. DONOVAN, Admr. of DANIEL H. DONOVAN, Deceased, ET AL., *Plffs. in Err.*,
v.

UNITED STATES.

(See S. C., 23 Wall., 383-405.)

Salary of collector—surveyor.

1. The Collector of the Port of St. Louis is not entitled to receive, under any circumstances, a salary of more than \$5,000, even if the office earns a greater amount.

2. A surveyor of that port, performing the duties of collector, is entitled to no greater salary.

[No. 479.]

Argued Jan. 25, 26, 1875. Decided, Feb. 8, 1875.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This case arose upon an information filed in the District Court of the United States for the Eastern District of Missouri, to recover a balance alleged to be due to the Government upon the account of Daniel H. Donovan, deceased. Judgment having been given in favor of the plaintiff and affirmed upon writ of error by the circuit court, the defendant sued out this writ of error.

Messrs. D. Thew. Wright, Jas. O. Broadhead and Noyes & Lloyd, for plaintiffs in error:

This law was undoubtedly meant to cover all ports in existence at the date of its passage, May 7, 1822. At that date there were the ports mentioned in section 9; there were also those not mentioned, which were covered by section 10. But why should the law be construed to apply to ports not then in existence, but which were afterward created with new duties, and new and distinct compensation?

Judge Ranney, in *Hall v. State*, 20 Ohio, 16, says:

"A well settled rule of construction here comes to our aid, which is, that 'A statute, referring to, or affecting persons, places or things, is limited in its operation to persons, places or things as they existed at the time the statute was passed,' " referring to *U. S. v. Paul*, 6 Pet., 141.

In the construction of statutes, it is a general rule, "That all words, whether they be in deeds or statutes or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter or person."

The Messenger v. Pressler, 13 Ohio St., 255; *Western College v. Cleveland*, 12 Ohio St., 375.

The words "all," "any" and "every," in the statute, are general rather than universal terms and are to be understood in one sense or another according to the demand of sound reason.

Stone v. Elliott, 11 Ohio St., 252-258; *Lorain Plank Road v. Cotton*, 12 Ohio St., 263-270.

They are words that may be understood in a limited sense.

Lehman v. McBride, 15 Ohio St., 573-596.

It is claimed to be reasonable that this law

should be confined in its operation, as to compensation, to the ports existing at the date of its passage. The enacting power knew what ports existed at that date. It knew what the duties performed by the then officers were.

But the Congress of 1822 could not be supposed to know what might take place in the distant future. It was entirely possible that the affairs of the country might so change as that new ports would be required. The duties of these new ports might be more onerous than those of any mentioned in section 9. Would it, then, be fair to limit the collectors of such new ports to a compensation inferior to that of those who do less work?

If, then, our view of the effect and operation of the Law of 1822 be the correct one, it goes far towards settling the merits of the case at bar.

The next law to which we draw attention, is that of Mar. 2, 1831.

Heyl, *Import Duties*, 240; 4 Stat. at L., 480.

By this Act, duties were imposed upon the Surveyor of the Port of St. Louis, which had never been imposed before.

But by this Act, St. Louis is constituted a port for the first time, and by section 5, surveyors are called upon to perform the duties; duties which appropriately belong to a collector's office and not a surveyor's. Hence it is that these surveyors are known as "surveyors, performing the duties of collectors."

It is certainly very evident that it would not be right, just, nor would it be law, for Congress to impose upon a man new duties, without paying him therefor. Government cannot take a man's property, nor his personal services, without compensation.

U. S. v. Morse, 3 Story, 87-91.

Therefore it is, that in section 5, Act of 1831, Congress provides that, for these additional services, the surveyor so performing the duties of collector shall have a salary of \$350, in addition to his customary fees.

Therefore, if before 1831 he received \$2,000, after 1831 he would be entitled to \$2,350, which shows that the limitation of \$2,000, in the Act of 1822, as to surveyors, does not apply to the surveyors of the Act of 1831, who performed the duties of collectors as well.

And the Act of 1822 does not limit that compensation to \$2,000, even granting that it was so limited before 1831.

The Law of 1841 undertook to say that collectors should get no more than \$2,000 profit out of the warehouse business.

It further limits the maximum compensation of those collectors to \$6,000. As this court has said, in *U. S. v. Walker*, 22 How., 299 (63 U. S., XVI., 382):

"But it is quite clear that there is nothing in the Act (1841) having the slightest tendency to show that the prior Act is repealed, so far as it is applicable to the collectors of non-enumerated ports."

"No new maximum is fixed to their compensation, and there is not a word in the new provision inconsistent with the 10th section of the prior Act."

Thus, the Supreme Court distinctly declares that the Act of 1841 created a new maximum compensation of \$6,000, and also, that it would be absurd to apply the new maximum thus created to collectors of non-enumerated ports.

And yet it is insisted that these surveyors, who are entitled to whatever compensation the Act of 1841 allows to collectors, are only entitled to the compensation of collectors of non-enumerated ports, viz.: \$5,000.

The Act of Mar. 3, 1857 (Heyl, Imp. D., 391), 11 Stat. at L., 221, provides, in section 8, that the provisions of section 5, of the Act of 1841, "shall apply to surveyors performing or having performed the duties of Collectors of the Customs, who shall be entitled to the same compensation as is allowed to collectors for like services in the settlement of their accounts."

It would certainly indicate that if there were any advantage in the way of compensation in the Act of 1841, these surveyors should be entitled to it. But it is further said, not only that the Law of 1841 should be construed to apply to them, but that they shall be entitled to the same compensation as is allowed to collectors for like services. Now, whatever collectors get, these surveyors must get, because they do like services. They perform the duties of collectors. Whatever collectors do, they do. Going back now to the Law of 1841, we find a maximum of \$6,000 fixed for collectors. "They shall not retain more than \$6,000 per year." That certainly means they may retain \$6,000 if their fees, etc., amount to that sum. It must still be remembered that the Law of 1841 is itself a limitation. For instance, the Surveyor of St. Louis, acting as Collector, gets fees amounting to \$10,000 or \$15,000. They are prescribed by law, and the law says he shall have them. Now comes the Law of 1841 which says: "He shall have no more than \$6,000." Certainly he is entitled to that.

But as the Law of 1857 was not thus construed by the department, the Law of 1872 was passed. 17 Stat. at L., 336.

The construction of the department was: the holding of such courts as had decided the question was, that the application of the Law of 1857 to the Law of 1841 was that the surveyors "performing duties of collectors," were entitled to \$5,000 and no more.

Then comes the Law of 1872. We say it was intended to increase that compensation, from its existing point of \$5,000 to something higher.

What does it say? "The Law of 1841 shall be amended." Why amended? It does not accomplish its object now. The result it arrives at, under the application of the Law of 1857, is not satisfactory. That result is \$5,000. This not being satisfactory, the law must be changed and amended. Can anything be clearer than that, if \$5,000 was satisfactory to Congress, no change of existing laws under the construction given was needed?

Under such construction, it was just as though the Law of 1841 read, in so many words, "Surveyors performing the duties of collectors shall only have \$5,000." Suppose it had so read, in point of fact, could anything be clearer than that the intention was that compensation should be changed from \$5,000 to some other sum higher or lower than \$5,000? If the change was to be made for the advantage of the surveyor, it is not claimed that it was intended to cut down the compensation, the \$5,000 must necessarily be increased.

Then, bearing in mind that the surveyors were already receiving \$5,000, and that the Law See 23 WALL.

of 1872 was evidently to be to their advantage in this matter of compensation, we have these further words, not in the Law of 1857: they are to have the same compensation as is allowed to collectors by said Act of Mar. 3, 1841. Prior to the Law of 1841, was any collector in the United States allowed \$6,000? Not one. By the Law of 1841, what is allowed the collectors spoken of therein "by said Act?" \$6,000. Prior to this Act (1872) these surveyors were receiving \$5,000. This Act was intended to increase that amount. If increased at all, where does the increase stop? At the allowance named in the Act of 1841, to wit: \$6,000.

Messrs. Geo. H. Williams, Atty-Gen., and S. F. Phillips, Solicitor-Gen., for defendant in error:

The case turns mainly upon the meaning of section 5 of the Act of 1841.

This Act refers to and confirms the allowances to collectors, naval officers and surveyors in the Act of 1822, sections 9 and 10, and, therefore, by the maxim, *Verba relata, inesse, videntur*, is to be read as if containing those sections, its main purpose being to amend section 11 of such former Act, which allowed to collectors, etc., the whole of what they might receive as fees upon fines, forfeitures, etc.

Stat., 3, 695.

It, therefore, by confirmation and by original enactment together, provides for two classes of collectors, etc., one being entitled to salaries of \$4,000, out of fees upon duties, etc., in addition to \$2,000, out of fees upon fines, etc., the other being entitled to salaries of \$3,000, out of duties, etc., in addition to \$2,000 out of fines. After effecting this, it proceeds to enact, by way of excluding any other official receipt, that under no pretense shall collectors, etc., receive more than \$6,000, etc.

It seems plain that this last clause is only a summary, as it were, of the effect of the former words of the section, as to the first class of collectors, etc., and cannot be construed as meaning that all collectors, etc., should have salaries of \$6,000, etc. It leaves the second class to the operation of the greater restrictions of preceding provisions. The Act of 1841 is a restraining, not an enlarging statute, and is to be construed accordingly.

If the Statute of 1841 recognizes and, in effect, provides for two classes of collectors, then the Acts of 1857 and of 1872, which refer surveyors doing collectors' duties, to the compensation provided in that statute for collectors, recognizes and provides for similar (*i. e.* two) classes of such surveyors, and, *Redendo singulis singulis*, refers such of these as may act at New York, etc., to the \$6,000 aggregate; those at other ports to that of \$5,000.

We are not concerned to explain why the Act of 1872 was passed when that of 1857 was already upon the Statute-Book. If the construction placed by the plaintiff upon the Act of 1841 be correct, then the Act of 1857 secures the claim made by him in the present action as completely as does that of 1872. If our construction of the Act of 1841 be correct, the Act of 1872 does not countervail its effect more than that of 1857. Both Acts refer themselves for explanation to the Act of 1841.

Judging by the language of the Act of 1872, its draughtsman may have thought that the pre-

that Act was promulgated as affecting to create a provision in regard to duties in cases and therefore, he may have intended the words "and" to be attached.

One construction of the Act is that it is as to the subject, is promulgated as being to a certain extent, to that policy of Congress which has drawn a line between certain officers, etc., and others. If there be such a policy, why should not a construction, maintaining it as to surveyors doing collectors' duties, be preferred to one which disregards it?

Again, if it were the purpose of Congress to give to officers like Ducovay, \$6,000 per annum out of such fees as they might receive, it would have been more natural and simpler to express that design in clear and fewer words than were adopted in the Act of 1872.

One expression in Acts intended by their promoters to give a larger compensation for services, which at such time are ended, than previous provisions had allowed, will not receive a construction to forward that design. For, as regards such services, the promoters are upon one side of the counter and the interests of the public are upon the other. The information is always *contra proferentem*, i. e., as applied here, against special legislation.

The construction placed by the plaintiff upon the Act of 1872 abolishes all distinction between collectors, as well as between surveyors doing collectors' duties. Both classes of officers, or neither, are, by the Act of 1872, to have \$6,000 in all cases. More than this, both officers, or neither, are to receive \$6,000 in case any department of their fee producing services amounts to so much; whereas, the Act of 1841 seems plainly to recognize that, in order to make up such \$6,000, one branch of such services must produce at least \$4,000, another at least \$2,000.

4 Ops. of Attys-Gen., 261 (Compensation, etc.)

The \$350 salary is included in the maximum, whatever that is. After the Act of 1831, such surveyors were not entitled to receive beyond the maximum of 1822. In that maximum, as applied to other officers, salaries, if any, were included.

Attys-Gen. Legare's Op., 3 Ops., 658 (Compensation, etc.)

It can make no difference that such salary was given by a subsequent statute. Such salary was given to eke out small receipts, not to disturb the pronounced policy of Congress as to the amount beyond which no salary ought to extend. There is no constitutional question involved, as suggested by the counsel. The office holder can resign. Whether he shall for additional labor have additional pay, is a dry question of policy.

The Act of 1822 applies to ports afterward established, as well as those then existing. This is a rule of statutory construction almost universal. Just as statutes affecting men operate as well upon those born after as upon those then living; as those affecting crimes apply to crimes afterwards created; as a statute referring non-enumerated articles, for the duty payable upon them, to a duty laid upon like enumerated articles, applies as well to enumerations in later statutes; as a statute inflicting penalties in respect to articles prohibited, applies as well to

articles prohibited by later statutes; so here, when the Act of 1822 speaks of other collectors, etc., it means all other, whether then existing or afterwards to be created. The claim of the plaintiff at St. Louis, of three per cent upon duties collected, goes upon this very construction.

Act of Mar. 2, 1794, 1 Stat. at L., 708; *Atty-Gen. v. Bowers*, 1 Price, 189; *Stuart v. Maxwell*, 16 How., 150; *U. S. v. Holiday*, 3 Wall., 487; 20 U. S., XVIII, 183.

Mr. Justice Clifford delivered the opinion of the court:

Officers of the customs derive their compensation chiefly from certain enumerated fees, commissions and allowances, to which is added, for the benefit of the collector of the port, a prescribed sum, called salary, which is very much less than the compensation to which the officer is entitled. Provision for such fees, commissions and allowances, were first made by the Act of the 31st of July, 1799, which also allowed to collectors certain proportions of fines, penalties and forfeitures. 1 Stat. at L., 29.

Changes have been made in the rates of fees, commissions and allowances for such purposes at different periods to graduate the compensation of such officers to the nature and extent of the services imposed, but the theory and outline of the system have been preserved since the first Acts were passed, levying import and tonnage duties. Examples of such changes are found in the Act of the 18th of February, 1793, 1 Stat. at L., 305, for enrolling and licensing ships and vessels, and in the Act of 2d of March, 1799, to regulate the collection of duties on imports and tonnage, and in the Act usually called the Compensation Act, passed on the same day. 1 Stat. at L., 627, 727.

Regulations of a permanent character were made by those several Acts that certain fees and commissions should be paid to the Collectors of the Customs, together with a certain proportion of the sums paid to them for fines, penalties and forfeitures collected from persons found guilty of violating the penal prohibitions of the revenue laws. Such fees, commissions and allowances it was provided should be paid to the respective collectors, and the requirement was that they should keep an accurate account of the same and of all expenses for rent, fuel, stationery and clerk hire, and that they should annually transmit such accounts to the Comptroller of the Treasury; but they were allowed by those laws to retain the whole amount of the emoluments derived from those sources beyond the expenses of the office, without any limitation whatever. Expenses for rent, fuel, stationery and clerk hire were to be deducted from the gross receipts; but they were allowed to retain the whole of the net balance as official emoluments for their services.

Business revived and importations increased, and with such increase the compensation of the collectors at certain ports became excessive, which called for new legislation; and by the Act of 30th of April, 1802, Congress prescribed a maximum rate of compensation without making any reduction of the fees or commissions required to be paid to the collectors, but the provisions of the Act did not extend to fines, penalties and forfeitures. 2 Stat. at L., 172.

By that Act it was provided that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amount to more than \$5,000, the surplus shall be accounted for and paid into the Treasury.

Twenty years' experience under that Act showed that it needed revision, as it applied, without any discrimination whatever, as well to the large ports where the principal importations were made as to those of comparatively little importance. Collection districts were accordingly divided by the Act of the 7th May, 1822, into two classes, usually denominated the enumerated and the non-enumerated ports. 3 Stat. at L., 693.

Under the provisions of that Act the emoluments of collectors of the enumerated ports might reach the sum of \$4,000; but the 9th section of the Act provided that, whenever the emoluments of the office shall exceed that sum, in any one year, the collector, after deducting the necessary expenses incident to his office, shall pay the excess into the Treasury for the use of the United States. But the maximum rate of compensation allowed to collectors of the non-enumerated ports under the provisions of that Act, from all the sources of emolument therein recognized and prescribed, is \$3,000; and the 10th section of the Act contains a provision similar to that found in the 9th section requiring the collector of the non enumerated ports to account for and pay the excess beyond the amount allowed as the maximum rate of compensation, into the public Treasury. *Hoyt v. U. S.*, 10 How., 185.

Collectors, under those provisions, may receive the maximum rate of their offices, if the office, after deducting the necessary expenses incident to the same, produces that amount from all the sources of emolument recognized and prescribed by the laws in operation. No one can receive more than the maximum rate, and his lawful claim may be much less, according to the amount of business transacted in the office. *U. S. v. Macdonald*, 2 Cliff., 281.

From that time until the passage of the Act of the 3d of March, 1841, 5 Stat. at L., 421, the laws providing for compensation of collectors remained without material change. Every such officer is required by the 5th section of that Act to include in his quarter yearly account, among other things, all sums received by him for rent and storage of goods, wares and merchandise stored in the public storehouses for which a rent is collected beyond what is paid for the same by such officer. Moneys received from that source, it is contended, may be retained by a collector of a non enumerated port sufficient to make his annual compensation \$6,000, the claim being that the maximum limit prescribed to the non-enumerated ports is repealed by the subsequent legislation, but this court held otherwise and decided that the collector under that Act could in no case retain more than \$2,000, and that he was bound to pay the excess beyond that amount into the Treasury as part and parcel of the public money. *U. S. v. Walker*, 22 How., 818 [69 U. S., XVI., 386].

Consequently, the conclusion was that the compensation of a collector of one of the enumerated ports may be \$6,000, but the compensation allowed to the collector of one of the non-enumerated ports cannot exceed \$5,000, according to the amount of fees and commissions collected and the amount received from rent and storage. Officers of the kind may receive the maximum rate of their office allowed by the prior law from the sources of emolument recognized and prescribed by that Act, provided the office, after deducting the necessary expenses incident to the same, yields that amount from those sources; and in addition thereto he is entitled to whatever sum or sums he may receive from rent and storage, provided the amount does not exceed \$2,000, but the excess beyond that sum and the excess, if any, beyond the maximum rate of his office as fixed under the prior law, he is required to pay into the Treasury as part and parcel of the public money. *U. S. v. Walker* [supra].

Attempt was subsequently made by the United States to limit the operations of the storage Act, as a source of compensation to collectors, to such storage only as is received for stores leased by the Treasury Department, for which rents are paid by the importers of goods beyond the rent paid on behalf of the United States; but the court refused to adopt that narrow construction and held that all sums received for storage, whether the goods imported were deposited in the public stores or the "other stores" named in the Acts of Congress, are required to be included in the quarter yearly account of the collector, which he is directed to render to the Secretary of the Treasury, and that the yearly aggregate of such sums constitute the basis of computation in ascertaining what amount, if anything, the collector is entitled to receive as compensation from that source of emolument, and what amount, if anything, he is required to pay over from that source, as excess beyond the \$2,000, into the public Treasury. *U. S. v. Macdonald*, 5 Wall., 656 [72 U. S., XVIII., 516]; *S. C.*, 2 Cliff., 283; *Clark v. Peaslee*, C. C., Mass. Dist., Oct. T., 1862 [1 Cliff., 545].

None of these propositions are controverted by the defendant, nor does he contend that any of those provisions have been superseded by any express repeal; but he insists that surveyors performing the duties of collectors, under the 5th section of the Act of the 2d of March, 1831, are entitled to the same compensation as the collectors of the enumerated ports.

Merchandise imported from a foreign port and consigned to merchants at St. Louis was required, if the importation was subject to custom duties, to be entered at the custom-house in New Orleans in the same manner as required in case of the entry of goods imported for consumption; and the officers of the customs at that port are required to proceed to assess the custom duties in the same way as if the merchandise had been destined for sale or consumption in that market.

Payment of the duties, however, is not required to be made at that port, but the importer is required to give a bond, called a transportation bond, conditioned that the packages described in the invoice shall, within a specified time, be delivered to the Surveyor and acting Collector of the Port of St. Louis. Due notice of the proceedings is then given by the collector of the port where the duties were ascertained and assessed to the acting collector of the port to which the merchandise is destined. Such

STATIONERIES, WHICH ARE THE FIRST TWO STATIONS
IN THE SOUTHERN RAILROAD SYSTEM AND ARE THE ONLY
OF THEIR KIND IN THE UNITED STATES. THE STATION AT
CHICAGO IS THE LARGEST AND MOST MODERN OF THE TWO.
THE STATION AT NEW YORK IS THE SECOND LARGEST AND
MOST MODERN. THE STATION AT CHICAGO IS THE ONLY ONE
WHICH HAS BEEN BUILT SINCE THE CIVIL WAR. THE
STATION AT NEW YORK WAS BUILT IN 1861. THE
STATION AT CHICAGO WAS BUILT IN 1904. THE
STATION AT NEW YORK IS THE ONLY ONE WHICH
HAS BEEN BUILT SINCE THE CIVIL WAR.

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THE UNITED STATES OF AMERICA
DO hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Department of the Interior, Bureau of Land Management, at Washington, D. C.

THE UNITED STATES OF AMERICA
DO hereby certify that
the within and foregoing is a true and correct
copy of the original as the same appears
from the records of the Department of the Interior
in the office of the Secretary of the Interior
at Washington, D. C.
this 1st day of January, 1901.
Secretary of the Interior

1. IN THE ABOVE STATEMENTS OF THE CASE BEFORE THE COURT, BUT IN NO CASE, HAS THE COMPENSATION OF AN INDIVIDUAL, IF SUCH INDIVIDUAL WAS A SUFFERER, BEEN BY ANY \$4.50. EVEN IF IT BE ADMITTED THAT AN INDIVIDUAL MAY BE AN ADDITION TO THE \$4.50 IN DAMAGES FROM THE OTHER SOURCES OF THE COURT, BUT NOT BEING AN ADDITION TO THE \$4.50 IN DAMAGES IN COMPENSATING THE MAXIMUM IN DAMAGES FROM THE COURT, DAMAGES AND ALLOW-
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THEY ARE NOT TO BE USED FOR ANY OTHER PURPOSE THAN THE ONE FOR WHICH THEY WERE DESIGNED. THEY ARE NOT TO BE USED FOR ANY OTHER PURPOSE THAN THE ONE FOR WHICH THEY WERE DESIGNED. THEY ARE NOT TO BE USED FOR ANY OTHER PURPOSE THAN THE ONE FOR WHICH THEY WERE DESIGNED.

THE COURT IS NOW MADE BY AN ATTEMPT TO DERIVE SUPPORT TO THE PROPOSITION THAT THE LIMITATION CONTAINED IN THE 10th ARTICLE OF THE COMPROMISE OF 1850 IS DERIVED FROM THE ACT WHICH PROVIDES FOR THE COMPENSATION OF SUCH A SURVEYOR AS IN THE CASE OF A BOUNDARY COLLECTIONS FOR THE SERVICE. BUT IT WILL BE SUFFICIENT TO SAY IN RESPONSE TO THE SUGGESTION THAT THE COURT IS OF THE OPINION THAT THE PROPOSITION IS DESTITUTE OF ANY FOUNDATION OR SUPPORT.

DECEASED THAT IS TO SAY IT IS INSISTED BY THE
DEFENDANT THAT THE ACT OF THE 9th OF JUNE, 1873,
WHICH LAW AS THE ADMINISTRATOR OF THE INES-
TATE TO PERMIT THE USE OF THE ESTATE OF THE DE-
CEASED A FEE OF COMPENSATION EQUAL TO \$6,000
THE BALANCE DUE THE COURT IS ENTIRELY OF A DIFF-
ERENT NATURE. 17 STAT. AT L. 336.

Sections of certain redundant words, the body of the Act is exactly the same as section 9 of the 1907 Act. 11 Stat. at L., 289. Both Acts provide that such a surveyor "Shall be entitled to the same compensation as is allowed to collectors for like services," and neither contains a word which is repugnant to the 10th section of the Compensation Act. 3 Stat. at L., 605.

Not is the proviso in the latter Act inconsistent with the former limitation, as the maximum allowance to such a collector is \$3,000 from fees and commissions and \$2,000 from rent and storage.

Adjuncts and forward

HENRY J. REEDY, *Appt.*,

v.

GEORGE SCOTT.

(See S. C., 23 Wall., 352-367.)

Surrender of patent—effect on suits—infringement of re-issued patent—supplemental bill for—re-issued patent—award of arbitrators—in-sufficient objection.

1. The surrender of a patent to the commissioner extinguishes the patent. It cannot be the foundation for the assertion of a right after the surrender.

2. Antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists and is in force at the time of the trial and judgment, the suits fail.

3. Where the original patent is surrendered, the infringement of the re-issued patent becomes a new cause of action for which, in the absence of any agreement or implied acquiescence of the respondent, no remedy can be had except by the commencement of a new suit.

4. Where, in such a case, the complainant seeks his remedy in a supplemental bill, no objection having been made by the respondent, the court may disregard the irregularity.

5. Re-issued patents are required by law to be for the same invention as that secured by the surrendered patent.

6. Where parties agreed to arbitrate an action for infringement and the arbitrator made an award, it must be presumed that the arbitrator construed the patent correctly, and that his finding in respect to the infringement is also correct.

7. Where the agreement to arbitrate and the submission were executed before the original patent was surrendered, and after its re-issue the arbitrator examined and decided the question submitted without any objection from either party growing out of the surrender or re-issue, and the surrender and re-issue did not change the issue in the litigation, and the re-issued patent was for the same invention as the original, all objection to the award by reason of the surrender and re-issue will be disregarded.

[No. 168.]

Submitted Feb. 3, 1875. Decided Feb. 15, 1875.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case is stated by the court.

Messrs. George E. Pugh, E. E. Wood and Edw. Boyd, for appellant:

I. The award of Mr. Fisher cannot be so construed, properly, as to impair or in anywise affect the rights of the complainant, in virtue of the letters patent as re-issued. Those rights were not within the terms of the submission.

Kyd, Awards, 1st Am. ed., 141, 142; *Hill v. Thorn*, 2 Mod., 809; *Brooke*, Abr., Arbitrament, pl. 27, et pl., 50; *Myers v. R. R. Co.*, 2 Curt., 23; S. C., 18 How., 246 (59 U. S., XV., 380);

Effect of the re-issue:

Buttin v. Taggart, 17 How., 74 (58 U. S., XV., 37); *Rubber Co. v. Goodyear*, 9 Wall., 788 (76 U. S., XIX., 566); *Stimpson v. R. R. Co.*, 4 How., 380; *Blake v. Stafford*, 6 Blatchf., 195; *Klein v. Russell*, 19 Wall., 433 (86 U. S., XXII., 116).

II. The supplemental bill was also a supplemental suit and, therefore, ought not by the decree to have been dismissed for a cause applicable only to the original bill.

Cotton v. Carlisle, 5 Mad., 427; *Candler v. Pettit*, 1 Paige, 168; *Woodworth v. Stone*, 3 Story, 749; *McGrath v. Balser*, 6 B. Mon., 141, 142; see, also, *Minnesota R. R. Co. v. St. Paul R. R. Co.*, 2 Wall., 609 (69 U. S., XVII., 886); S. C., 6 Wall., 742 (73 U. S., XVIII., 856).

(No counsel appeared for appellee.)

See 23 WALL.

Mr. Justice Clifford delivered the opinion of the court:

Patents may be surrendered in certain cases in order to obtain a new patent for the same invention, with a corrected specification.

Surrenders of the kind take effect when the amended patent is issued, and from that time the original patent ceases to be operative as a franchise to vest in the patentee the exclusive right to make and use the invention, and vend the same to others to be used.

Such a patent, so re-issued, together with the corrected specification, it is provided shall have the same effect and operation in law on the trial of all actions for causes hereafter arising, as though the same had been originally filed in such corrected form.

Surrendered patents cease to be operative when the new patent is issued; from which it follows that such a patent, after the surrender, is not the proper foundation for an action at law or of a suit in equity, to recover either damages or profits for the infringement of the invention.

Pending suits are defeated when it appears that the patent on which the suit is founded has been surrendered, nor is a supplemental bill setting up the re issued patent a proper pleading to revise such a suit in equity, as nothing can be recovered, either as damages or profits, for the infringement of the surrendered patent. *Moffit v. Garr*, 1 Black, 273 [66 U. S., XVII., 207].

Re issued patents must be for the same invention as the original patent; but if the defense be that it is for a different invention, the original patent, though inoperative as a cause of action or to protect the rights of the inventor, is yet admissible in evidence to sustain or disprove such a defense; nor can it be doubted that it may be the subject of reference as to a repealed statute, to aid in the construction of the new patent issued upon the corrected specification.

Letters patent were granted to the appellant on the 9th of June, 1868, for an improvement in hoisting machines, which is therein represented to be new and useful, and of which improvement the appellant alleges that he is the original and first inventor. Such an inventor of such an improvement so secured by valid patent, is entitled for the term specified to the exclusive right and liberty of making and using the invention, and of vending the same to others to be used. Pursuant to the patent, he claims to enjoy that exclusive right, and he charges that the respondent below, without license and in violation of his exclusive right, has made, constructed, used and vended to others to be used, large numbers of hoisting machines, which are the same in principle and mode of operation as the invention secured to him in his patent, and he prays for an account and for an injunction.

Service was made, and the respondent having failed to appear, the court entered an order that the bill of complaint be taken as confessed. On motion to the court, however, it was subsequently ordered that the complainant have leave to file a supplemental bill, and that the decree *pro confesso* be set aside, and that the respondent may plead, answer or demur within thirty days. Under that leave, the complainant filed a supplemental bill, in which he alleges that he

surrendered the original patent subsequent to the commencement of the suit, and that a re-issued patent in due form of law was granted to him for the same invention, and he charges that the respondent since that time has made, constructed, used and vended to others to be used, his said invention, without license and in violation of his exclusive rights as secured by the re-issued patent. Leave having been granted, the respondent appeared and pleaded in bar of the charge contained, both in the original and in the supplemental bills, that the parties after the original bill was filed entered into an arrangement in writing under their hands and seals, in which they stipulated to submit to Samuel S. Fisher, the question whether the machine manufactured by the respondent is or is not an infringement of the complainant's patent, and to abide his decision of the question; that if he decided that the machine of the respondent does infringe that of the complainant, the former agrees to abandon the manufacture of such machine and to make no more of the kind in the United States; that if the arbitrator decided that the machine of the respondent does not infringe that of the complainant, then the latter agrees that his bill of complaint shall stand dismissed at his cost, and that he will not molest the respondent in the manufacture of the machines; that the parties in pursuance of the agreement appeared before the person named as arbitrator and submitted the agreed question to him for his arbitration and decision; that the person designated by the parties consented to act as arbitrator, and that the parties having been fully heard by him, he made and published his decision and award therein in writing, wherein he found and decided in answer to the question submitted, that the machine manufactured by the respondent is not an infringement of the patent of the complainant for an improvement in hoisting machines.

Instead of demurring to that plea or tendering an issue to its allegation, the complainant, under leave, filed what he denominated "A further supplement to his original bill and amendment to his first supplement." By that pleading he admits that the parties agreed in writing to submit the whole question of infringement to the opinion of the arbitrator; that he, the arbitrator, drew up the agreement which they signed, but he avers that he did not understand that the agreement made the further prosecution of the suit dependent upon the opinion to be given by the arbitrator, and alleges that he executed it without consulting his solicitors in the suit, and without knowing the effect of the stipulation; that as soon as he became advised of the nature of the agreement, he called upon the arbitrator and informed him that he, the pleader, misunderstood the nature and effect of the agreement, and served him with a notice in writing revoking all authority and power given him by the instrument.

Still, he admits that the arbitrator did proceed in the matter of the reference and that he did make and deliver an opinion with respect to the infringement of the first claim of the original patent; but he alleges that the arbitrator did not make any award as to the second claim, for the infringement of which, as well as the first, the suit was brought; and he avers that the arbitrator did not award that anything

should be done by the parties; that he was not notified of the sittings of the arbitrator, and that no opportunity was given him to call witnesses or to be heard in person or by counsel, and that neither the infringing machine nor any evidence of the same was introduced at the hearing.

Responsive to those charges, the respondent re-filed his plea to the original bill, and alleged that it is not true that the complainant signed the agreement without understanding its effect, nor that he revoked the power conferred before the arbitrator made and published his decision and award, nor that the complainant was not notified of the sittings of the arbitrator, nor that he was deprived of the opportunity to call witnesses or to be heard in person or by counsel.

Proofs were taken on both sides, and the parties having been fully heard, the circuit court entered a decree dismissing the bill of complaint, together with the supplemental bill; and the complainant appealed to this court.

Since the case was entered here, the complainant has filed the following assignment of errors:

(1) That the circuit court erred in holding that the plea of the respondent was true and sufficient with respect to the matters alleged in the supplemental bill.

(2) That the said court erred in finding that the equity of the case with respect to the matters set forth in the supplemental bill is with the respondent.

All necessity for any discussion of the charges contained in the original bill of complaint is superseded, as the assignment of errors does not impugn in that respect or call in question the correctness of the decision or decree of the circuit court. Such an assignment of errors, if it had been filed, would have been utterly unavailing, for the reason that the surrender of a patent to the commissioner, within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence the patent can no more be the foundation for the assertion of a right, after the surrender, than could an Act of Congress which has been repealed, and it has frequently been determined that suits pending which rest upon an Act of Congress fall with the repeal of it. Antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists and is in force at the time of the trial and judgment, the suits fail. *Moffitt v. Garr* [*supra*]; *Curt. Pat.*, secs. 342, 899.

Where the patent expires and is extended pending the litigation, and the infringement by the respondent is continued in respect to the extended patent, a supplemental bill is a proper pleading to prolong the suit, as in that state of the case the complainant may well claim, if he is the original and first inventor of the improvement, to recover of the respondent the gains and profits made by the infringement, both before and subsequent to the extension, but the rule is otherwise where the original patent is surrendered, as the effect of the surrender is to extinguish the patent; and hence it can no more be the foundation for the assertion of a right than can a legislative Act which has been repealed without any saving clause of pending actions. Consequently, the infringement of the

re-issued patent becomes a new cause of action for which, in the absence of any agreement or implied acquiescence of the respondent, no remedy can be had except by the commencement of a new suit.

Instances, however, may be found where, in such a case, the complainant sought his remedy in a supplemental bill, no objection having been made by the respondent, and such examples induce the court to disregard the irregularity in this case, inasmuch as neither the respondent or the court below appear to have regarded it as a matter of any importance. Instead of that the complainant was permitted to file his supplemental bill charging infringement as in case of an extended patent, and the respondent making no objection to the regularity of the bill, refiled the plea which he filed to the original bill of complaint, accompanied with a general denial of every material allegation contained in the supplemental bill, as subsequently amended by leave of the court. Subsequently the proofs exhibited were taken and, the parties having been heard, the court entered the aforesaid decree deciding the whole case, as more fully set forth on the record. None of the proofs were taken before the re-issued patent was granted, nor until after the supplemental pleadings were completed.

These suggestions are sufficient to show that every irregularity, whether on the one side or the other, was waived before the decree of the circuit court was entered, and that both parties understood that the question submitted to the arbitrator was whether the machine manufactured by the respondent infringed the improvement invented by the complainant. Conclusive support to that proposition is found in the fact that both parties proceeded, throughout the trial in the circuit court, upon the legal ground that the re-issued patent was for the same invention as that embodied in the original patent.

Re-issued patents are required by law to be for the same invention as that secured by the surrendered patent, and the complainant expressly alleges in this case that his re-issued patent is for the same invention as the surrendered original. Nor can the court take any other view of the case, as neither the original nor the re-issued patent is made a part of the record. Clear proof is exhibited that the agreement to arbitrate and the submission in form were both executed before the original patent was surrendered, and that the submission had been signed and delivered before the complainant made any effort to revoke the instrument.

Sufficient has already appeared to show that the arbitrator examined the question submitted to him, and made an award that the machine manufactured by the respondent did not infringe the invention secured to the complainant in his original patent, and that he gave his reasons for the conclusion, which appear to be satisfactory as far as can be ascertained without the means of comparing the patent of the complainant with the machine of the respondent. Such a comparison cannot be made without such means, nor can the court look out of the record for means to make the comparison.

Attempt is made to avoid the force and effect of the award of the arbitrator, upon the ground

that the complainant was misled in signing the agreement and that he was deprived of the opportunity to summon witnesses and to be heard in person or by counsel; but it will be sufficient to say, in response to those suggestions, that the proofs exhibited do not satisfactorily sustain the charges. On the contrary, enough appears to convince the court that the agreement is obligatory and that the complainant is bound to execute the agreement and to dismiss his bill of complaint and not to molest the respondent in the manufacture of his machine.

Substantial doubt cannot be entertained that the rule of decision adopted by the arbitrator is correct if he properly construed the patents. He found that the patent of the complainant was a combination of old ingredients, and that the machine manufactured by the respondent did not contain all of the ingredients embodied in the combination patented by the complainant. Nothing is exhibited in the record to show that the arbitrator erred in the construction of the patent, and if he did not and his finding as to the character of the machine manufactured by the respondent is correct, it is settled law that his decision is correct. *Gill v. Wells* [89 U. S., XXII., 499]; *Gould v. Rees*, 15 Wall., 194 [82 U. S., XXI., 41]; *Vance v. Campbell*, 1 Black, 428 [66 U. S., XVII., 171]; *Prouty v. Ruggles*, 16 Pet., 341; *Carver v. Hyde*, 16 Pet., 514; *Brooks v. Fiske*, 15 How., 212; *Stimpson v. R. R. Co.*, 10 How., 329.

Arbitrators as well as courts are presumed to decide correctly until the contrary appears, and if the party desires that the decision of such a tribunal shall be re-examined by an appellate court he must see that the means for such a review is embodied in the record. Neither the patent of the complainant or any authentic description of the machine manufactured by the respondent is contained in the record, and in the absence of such it must be presumed that the arbitrator construed the patent correctly, and that his finding in respect to the construction and mode of operation of the machine manufactured by the respondent is also correct.

Judging from the character of the assignment of errors, it is presumed that none of these views as applied to the matters alleged in the original bill are controverted, and the court here is of the opinion, in view of the previous explanations, that they are equally applicable to the matters alleged in the supplemental bill, for several reasons:

(1) Because the agreement to arbitrate and the submission in form were duly executed before the original patent was surrendered.

(2) Because the arbitrator proceeded to examine and to decide the question submitted, without any objection from either party, growing out of the surrender or re-issue.

(3) Because the subsequent pleadings and proceedings in the suit show that the surrender and re-issue did not have the effect to change the substantial issue in the litigation.

(4) Because the complainant alleged in his supplemental bill that the re-issued patent was for the same invention as that embodied in the original.

(5) Because the agreement to dismiss the bill of complaint, if executed by a proper decree, must include all the subsequent appendages to

it, and would be of itself a decision adverse to the complainant.

Decree affirmed.

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SAMUEL HEPBURN, *Plff. in Err.*,
v.
THE SCHOOL DIRECTORS OF THE BOR-
OUGH OF CARLISLE, in PENNSYLVANIA.

(See S. C., 23 Wall., 480-485.)

Taxation of bank shares—valuation of—assessment—municipal and school taxes.

1. Shares of stock in a national bank may be valued for taxation by the State in which the bank is located, at an amount exceeding their par value, although they cannot be taxed at a greater rate than is assessed upon other moneyed capital.

2. Under the Act of Congress of Mar. 31, 1870, the power of assessment is not limited to the par value.

3. Municipal and school taxes may be assessed upon the shares of a national bank, although mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation, except for state purposes, in the borough where the bank is located.

[No. 174.]

Argued Feb. 4, 1875. Decided Feb. 15, 1875.

IN ERROR to the Supreme Court of the State of Pennsylvania.

The plaintiff in error was the owner of 460 shares of the capital stock of the First National Bank of Carlisle, Pennsylvania, a Corporation duly organized under the Act of Congress of Feb. 25, 1862. The par value of these shares was \$100 each. They were duly assessed as of the value of \$150 per share. The School Commissioners levied a tax of nine and one half mills on the dollar, on all taxable property in the Borough of Carlisle, and the tax levied upon the stock of the plaintiff in error was accordingly \$655.50. This tax the plaintiff in error refused to pay. Suit was brought in the Court of Common Pleas of Cumberland County, and the case was submitted upon an agreed statement of facts. The Court of C. P. rendered judgment in favor of the plaintiff in error, which judgment was reversed by the Supreme Court of the State, and judgment entered for the defendants in error. Hence, this writ of error.

The case further appears in the opinion of the court.

Messrs. Joseph Casey and Samuel Hepburn, for plaintiff in error, cited the Act of Congress of Feb. 10, 1868, and the Acts of the Legislature of Pennsylvania of Apr. 4, 1868, and Mar. 1, 1870.

Messrs. Carlisle & McPherson, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The most important question presented by the assignment of errors is, whether shares of stock in a national bank can be valued for taxation by the State in which the bank is located, at an amount exceeding their par value. It is

certain that they cannot be taxed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State. Such is the express provision of the Act of Congress.

It is contended that the term "moneyed capital," as here used, signifies money put out at interest, and that as such capital is not taxed upon more than its par or nominal value, the par value of these shares is their maximum taxable value.

We cannot concede that money at interest is the only moneyed capital included in that term as here used by Congress. The words are "other moneyed capital." That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term.

But even if it were true that these shares can only be taxed as money at interest is, the result contended for would not necessarily follow. The money invested in a bank is not money put out at interest. The money of the bank is so put out and the share of the shareholder represents his proportion of that money. What the amount of this share is, must, in some form, be ascertained in order to determine its taxable value. If the nominal or par value of the stock necessarily indicated this amount, there might be some propriety in making that the taxable value; but, as all know, such is not the case. The available moneyed capital belonging to a bank may be diminished by losses or increased by accumulated profits. Therefore, some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock. The State of Pennsylvania has provided that this may be done by an official appraisement, taking care to prevent abuses by declaring that such appraisement shall not be higher than the current market value of the stock at the place where the bank is located, and by giving an appeal to the Auditor General, who is authorized to inquire into the value and correct any errors that may appear. There certainly is no apparent injustice in this. It is not the amount of money invested which is wanted for taxation, but the amount of moneyed capital which the investment represents for the time being.

If the value set upon the share does not exceed this amount it will not be assessed at a greater rate than other money at interest. Other plans may be devised to accomplish the same end, but it is sufficient for the purposes of this case that this plan is not unreasonable. If a shareholder is not satisfied with the original appraisement, all he has to do is to appeal to the Auditor-General, make known to him the actual condition of the affairs of the bank, and have the error, if any exists, corrected. Hepburn did not see fit to avail himself of this right which he had. He preferred to rest upon his supposed right, under the Act of Congress, to limit the power of assessment to the par value. This right, we think, he did not have.

It is next insisted that no municipal or school taxes could be assessed upon the shares of the First National Bank of Carlisle, a national bank located within the Borough of Carlisle, because by the laws of Pennsylvania, as is claimed, other moneyed capital in the hands of individ-

NOTE.—Taxation of stock or shares in corporation does not impair obligation of contracts. Taxation of shares in national banks and of other corporations. See note to Providence Bk. v. Billings, 29 U. S. 4 Pet., 514.

ual citizens at that place is exempt from such taxation.

In support of this claim it is shown that all mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation in that borough except for state purposes. This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. Necessarily there may be other moneyed capital in the locality than such as is exempt. If there is, moneyed capital, as such, is not exempt. Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt. Certainly there is no presumption in favor of such an intention. To have effect, it must be manifest. The affirmative of the proposition rests upon him who asserts it. In this case it has not been made to appear.

This, we believe, embraces all the errors assigned on this record. Other questions were raised in the court below, but they are not relied upon here.

The judgment is affirmed.

Cited—44 U. S., 417; 95 U. S., 21; 105 U. S., 326; 19 Blatchf., 245, 246; 2 Filipp., 67, 72, 75; 71 Mo., 509; 36 Am. Rep., 495.

WILLIAM LEWIS, *Appt.*,

BENJAMIN F. HAWKINS ET AL.

• (See S. C., 23 Wall., 119-123.)

Contract to sell land—vendor's lien—estate of vendee—purchase money—possession—bankrupt discharge.

1. Where an agreement is made to sell land upon the execution of notes for the price and the title bond, the vendor holds the legal title as trustee for the vendee, and the vendee is a trustee for the vendor as to the purchase money.

2. The seller under such circumstances has a vendor's lien.

3. The equitable estate of the vendee is alienable, descendible and devisable in like manner as real estate held by a legal title.

4. The securities for the purchase money are personalty, and in the event of the death of the vendor they go to his personal representative.

5. If there was no authority to the vendee to take possession and he enters into possession, he holds as a licensee or tenant at will. The vendee cannot in such case dispute the title of his vendor.

6. One having bought of the vendee and assumed the payment of the purchase money stipulated to be paid by him, took the property subject to the same liabilities, legal and equitable, to which it was subject in the hands of the vendee.

7. The discharge in bankruptcy released the vendee from personal liability for his debt, but the Statute of Limitations cannot avail to protect the land, in the hands of the purchaser of it from the vendee, from the vendor's lien upon it for the purchase money.

[No. 186.]

Submitted Feb. 10, 1875. Decided Feb. 22, 1875.

APPEAL from the Circuit Court of the United States for the Western District of Arkansas.

NOTE.—Lien for purchase money. See note to Bayley v. Greenleaf, 20 U. S. (7 Wheat.), 46.

Statute of Limitations and lapse of time no bar to trusts. See note to Prevost v. Gratz, 19 U. S. (6 Wheat.), 481.

See 23 WALL.

U. S., BOOK 23.

The case is stated by the court.

Mr. A. H. Garland, for appellant.

Messrs. Pike & Johnson, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity from the Circuit Court of the United States for the Western District of Arkansas.

On the 25th of November, 1853, Lewis sold to Hawkins the premises described in the bill in this case.

For the consideration money, Hawkins made and delivered to Lewis two promissory notes of that date, each for the sum of \$500, one payable on the first of February, 1855, and the other on the first of February, 1856. At the same time Lewis gave Hawkins his bond in the penal sum of \$2,000, binding Lewis, upon the payment of the two promissory notes, to convey the premises so sold in fee simple. On the 12th of October, 1855, Hawkins sold and conveyed the land to David Hamiter. As a part of the consideration, Hamiter assumed the payment of the notes of Hawkins to Lewis. Hamiter went into possession of the premises and occupied them with his family until his death, which occurred in May, 1866. The appellee, Rhoda Hamiter, is his widow and executrix, and one of his devisees. She and her family have occupied the premises ever since her husband's death. He left nine children, who are his heirs at law and devisees. On the 11th of August, 1860, Lewis recovered a judgment against Hawkins upon the two promissory notes of the latter, for \$1,201. Nothing has ever been paid by anyone upon the judgment or upon the notes. The appellant brought this bill to enforce the payment of the notes and interest against the land. Hawkins has set up as a defense, his discharge in bankruptcy. Rhoda Hamiter relies upon the Statute of Limitations of Arkansas of January 4, 1851, which bars suits at law and in equity for real estate, after the lapse of seven years from the time the cause of action accrued.

There is no controversy between the parties as to the facts. The questions presented for our consideration are questions of law.

Upon the execution of the notes and the title bond between Lewis and Hawkins, Lewis held the legal title as trustee for Hawkins; and Hawkins was a trustee for Lewis as to the purchase money. Hawkins was *cestui que trust* as to the former and Lewis as to the latter. 1 Story, Eq., sec. 789; 2 Story, Eq., sec. 1212; 1 Sugd. Vend., 175; *Swartwout v. Burr*, 1 Barb., 499; *Champion v. Brown*, 6 Johns. Ch., 402. The seller under such circumstances has a vendor's lien, "which is certainly not impaired by withholding the conveyance." The equitable estate of the vendee is alienable, descendible and devisable in like manner as real estate held by a legal title. The securities for the purchase money are personalty, and in the event of the death of the vendor, go to his personal representative. 2 Story, Eq., sec. 1212. It does not appear that the title bond authorized Hawkins to take possession, or that he did so. If there were no such authority, and he entered into possession, he held as a licensee or tenant at will. *Suffern v. Townsend*, 9 Johns., 35; *Dolittle v. Eddy*, 7 Barb., 75. The vendee cannot in such cases dispute the title of his vendor any more

than the lessee can dispute that of his lessor. *Whiteside v. Jackson*, 1 Wend., 422; *Hamilton v. Taylor*, 1 Litt. Sel. Cas., 444. Any other person coming into possession under the vendee, either with his consent or as an intruder, is bound by a like estoppel. *Jackson v. Walker*, 7 Cow., 687. Hamiter, having bought and assumed the payment of the purchase money stipulated to be paid by Hawkins, took the property subject to the same liabilities, legal and equitable, to which it was subject in the hands of Hawkins. 1 Story, Eq., sec. 789; 1 Sugd Vend., Perkins' ed., 175; *Champion v. Brown*, 6 Johns. Ch., 402; *Muldrow v. Muldrow*, 2 Dana, 387; 2 Har. & J., 64; *Shipman v. Cook*, 1 C. E. Green, Ch., 254.

The discharge in bankruptcy released Hawkins from personal liability for his debt, but the Statute of Limitations cannot avail to protect the land from the vendor's lien upon it, for the purchase money which Hawkins agreed to pay, and which Hamiter, when he bought the land, assumed and agreed to pay for him.

We have already shown that as between Lewis and Hawkins there was a trust, which embraced the purchase money and fastened itself upon the land. The debt did not affect his assignee personally, but as we have also shown it continued to bind the land in all respects as if the transfer had not been made. The trust was an express one. Its terms and purposes were evinced by the title bond, and the promissory notes to which that instrument referred. "As between trustee and *cestui que trust*, in the case of an express trust, the Statute of Limitation has no application, and no length of time is a bar. Accounts have been decreed against trustees extending over periods of thirty, forty and even fifty years. The relations and privity between trustee and *cestui que trust* are such that the possession of one is the possession of the other, and there can be no adverse possession during the continuance of the relation. * * * A *cestui que trust* cannot set up the statute against his *co-cestui que trust*, nor against his trustee. These rules apply in all cases of express trusts." Perry, Tr., sec. 863.

"As between trustees and *cestui que trust*, an express trust, constituted by the act of the parties themselves, will not be barred by any length of time, for in such cases there is no adverse possession, the possession of the trustee being the possession of the *cestui que trust*." Hill, Tr., 264*.

The same principle applies where the *cestui que trust* is in possession. He is regarded as a tenant at will to the trustee. "Therefore, until this tenancy is determined there can be no adverse possession between the parties." Hill, Tr., 266*. The relation once established is presumed to continue, unless a distinct denial or acts, or a possession inconsistent with it are clearly shown.

Whiting v. Whiting, 4 Gray, 236; *Creigh v. Henson*, 10 Gratt., 231; *Spickernell v. Hotham*, Kay, 669; *Garrard v. Tuck*, 65 Eng. C. L., 249; S. C., 8 Man., G. & S., 231; *Decouche v. Savetier*, 8 Johns. Ch., 190; *Anstice v. Brown*, 6 Paige, 448; *Kune v. Bloodgood*, 7 Johns. Ch., 90.

In many of the cases it is held that the lien of the vendor, under the circumstances of this case, is substantially a mortgage. *Lingan v. Henderson*, 1 Bland, Ch., 236; *Moreton v. Har-*

rison, 1 Bland, Ch., 491; *Relfe v. Relfe*, 34 Ala., 504. It is well settled that the possession of the mortgagor is not adverse to that of the mortgagee. In the case last cited it is said that to apply the Statute of Limitations "Would be like making the lapse of time the origin of title in the tenant against his landlord." That the remedy upon the bond, note or simple contract for the purchase money is barred in cases like this, in nowise affects the right to proceed in equity against the land. As in respect to mortgages, the lien will be presumed to have been satisfied after the lapse of twenty years from the maturity of the debt, but in both cases laches may be explained and the presumption repelled. *Moreton v. Harrison*, *supra*. The principles upon which this opinion proceeds are distinctly recognized in *Harris v. King*, 16 Ark., 122. That case alone would be decisive of the case before us. The considerations which apply where the vendor in such cases resorts to an action of ejectment were examined by this court in *Burnett v. Caldwell*, 9 Wall., 290 [76 U. S., XIX., 712].

The bill avers the tender of a deed by the complainant to Hawkins before the bill was filed. The answer of Hawkins denies the allegation. The testimony of Lewis sustains the bill; that of Hawkins the answer. The averment is not established. Except as to the costs, the point is of no significance. If the tender of a deed had been properly made, and there had been no unjustifiable resistance to the taking of the decree by the complainant, to which he is entitled, he would have been required to pay all the costs. There being a contest, and it appearing that a tender would have been without effect, the costs must abide the result of the litigation. *Keisigbrack v. Livingston*, 4 Johns. Ch., 144; *Hanson v. Lake*, 2 Younge & C. Ch. Cas., 328.

There is manifest error in the decree, but the bill is defective in not making the heirs at law of David Hamiter parties, unless there is some statutory provision of the State of Arkansas which obviates this objection.

If necessary the bill can be amended in the court below.

The decree of the Circuit Court is reversed, and the cause will be remanded, with directions to proceed in conformity with this opinion.

Cited—1 McCrary, 631; 31 N. J. Eq., 781.

WILLIAM SMITH, *Plff. in Err.*,

v.

JAMES M. ADSIT, impleaded with SIREL WRIGHT and PATRICK ROURK and THE TRUSTEES OF SCHOOLS OF TOWNSHIP 34 N., ETC., in GRUNDY COUNTY, ILLINOIS.

(See S. C., 23 Wall., 368-374.)

Federal questions—what are not.

What amounts to a trust, or out of what facts a trust may spring, are not federal questions. On a

NOTE.—Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S. See note to *Matthews v. Zane*, 8 U. S. (4 Cranch), 382; note to *Martin v. Hunter*, 14 U. S. (1 Wheat.), 304; and note to *Williams v. Norris*, 25 U. S. (12 Wheat.), 117.

writ of error to a State Court, this court can review only decisions of federal questions.

[No. 505.]

Submitted Feb. 15, 1875. Decided Mar. 1, 1875.

IN ERROR to the Supreme Court of the State of Illinois.

On motion to dismiss.

This case first arose in a State Court of Illinois, upon a bill by the present plaintiff in error, to establish a trust in certain lands on the ground of alleged fraud. A decree was entered in favor of complainant. The case, after twice going to the Supreme Court of the State, upon writ of error, was dismissed for want of jurisdiction. Brought, then, by writ of error to this court, the case was dismissed here in December Term, 1872, for want of jurisdiction, as reported in 83 U. S., 185, XXI., 310. Thereupon the complainant, in Sep., 1873, again sued out a writ of error from the Supreme Court of Illinois to the inferior State Court, which writ was again dismissed with the following opinion, by Schofield, J.:

"This is the same record that was before this court at the September Term, 1869, in the reported case of *Adsit v. Smith*, 52 Ill., 412. The error now assigned was there assigned, by the present plaintiff in error (then appellee) as a cross error, and there was joinder in error thereon, by the present defendants in error.

There was no necessity to re-docket the case after the assignment of the cross error, as that neither changed the title of the case before the court, nor required the filing of a new record. The only effect of the assignment of the cross error was to present an additional question on the same record. Although the present defendants in error were not brought before the court by the appeal of *Adsit*, and when the cross error was assigned, they were entitled to be notified before it was disposed of by proper process, yet they waived this by joining in error. Under the statute then and still in force, it is not necessary to obtain the consent of the court to assign cross errors. It was allowed as a matter of right. When the cross error was assigned, and there was joinder thereon, the questions now attempted to be raised were fully before the court, and its decision thereon is conclusive of this case.

It was then said by the court: 'There being no evidence of trust or fraud on the part of *Adsit*, his testimony balancing that of *Holmes* on that point, nothing is left of the case but the fact of obtaining, by *Adsit*, *Holmes'* discharge, and procuring thereon a warrant to be issued for the land in controversy. The most that can be said of this is, that the transaction was in violation of an Act of Congress; but that would not give a court of chancery jurisdiction to hold *Adsit* as a trustee and make him accountable as such. All the matter alleged of trust and of fraud has no support in the testimony.'

This view of the case, as to *Adsit*, necessarily disposed of the questions raised by the cross error.

No theory of the case was then presented and none is now, by which the present defendants in error can be held to be trustees for the plaintiff in error, except by first establishing a trust in *Adsit*, by whose fraudulent conduct, alone, it is claimed, this trust was created.

See 23 WALL.

We are of opinion that the plea presents a complete defense to the writ.

The writ of error is dismissed."

Thereupon the complainant sued out the present writ of error.

Messrs. Thomas Wilson and W. H. King, for defendant in error:

The case was before this court as No. 105, December Term, 1872. It was then heard, on motion to dismiss for want of jurisdiction, because no federal question was raised in the record.

The opinion was delivered by *Mr. Justice Strong*, and is reported in 16 Wall., 185 (83 U. S., XXI., 310).

The judgment of the court was, that the writ be dismissed, with costs.

The present motion is precisely the same as the former, and the question now presented is precisely the same as that before decided.

It must be considered as *res judicata*. A perusal of the opinion will show that no federal question was raised in the court below; that no decision was made by that court upon any such question, and that no right, title, privilege or immunity under any Act of Congress was decided adversely to the plaintiff in error. On the contrary, it appears that the bill was dismissed by the court below for want of jurisdiction. The case was brought upon the equity side of the court, and its equitable jurisdiction claimed by reason of an alleged fraud committed by *Adsit* upon *Holmes*; that out of this fraud and depending upon it, there sprung a constructive trust between *Adsit* and *Holmes*. Now, the court found against the fraud and against the trust and, therefore, decided that it had no equity jurisdiction, and dismissed the bill. This was the case as made in 16 Wall. (83 U. S., XXI.), wherein this court decided:

1. That no federal question appeared to have been raised or decided in the court below;

2. If so, it did not appear that any such question was decided adversely to the plaintiff in error; and,

3. The bill, having been dismissed in the court below for want of jurisdiction on the equity side, the judgment respecting the extent of its equity jurisdiction was, of course, not reviewable here, and so the writ of error was, as before stated, dismissed with costs.

Since the decision by this court, the plaintiff in error has taken further proceedings in the court below.

These proceedings will show that the decision and judgment of the court, formerly made, covered the whole case, and that no question was then raised that has not been decided in the former opinion and judgment; that the cross errors then assigned, were before assigned, were considered by the court and included in its judgment.

Therefore, the court adhered to its former decision.

Mr. W. T. Burgess, for plaintiff in error:

As I understand this case from the report of it in 16 Wall., 185 (83 U. S., XXI., 310), it was then dismissed upon the hypothesis that there had been no appeal taken by *Smith*, plaintiff in error, from the decree of the lower court (the Superior Court of Chicago), dismissing his bill as to *Wright* and *Rourk*, and the questions involved as between them and him had, therefore, not been passed upon by the State Supreme

Court. Acting upon the construction thus given by this court to the proceedings in, and judgment of the State Supreme Court, Smith sued out a writ of error from that court, to reverse this decree of the Superior Court in favor of Wright and Rourk against him, making them parties impleaded with Adsit. They, Wright and Rourk, came in and pleaded, specially the cross errors assigned by Smith against them in Adsit's appeal, and that they had joined in error upon them in bar, and the State Supreme Court sustained their plea, refused to entertain the case, and dismissed the writ, expressly upon the ground that those defendants, Wright and Rourk, were before that court upon such cross errors and joinder therein; thus holding that there was an appeal from that decree and it had affirmed it, and so passed upon all the rights of all the parties, while this court had held in its opinion upon the record, that there had been no appeal from that decree and that the State Supreme Court had not passed upon those rights.

Holmes claimed, under the Act of Congress referred to in the bill of complaint, to be entitled to the land. The legal title Adsit had acquired from the United States. He transferred it to other parties before he obtained his patent upon the papers, as they existed in the land office. These papers and the patent, when issued, advised all parties claiming under them, that the sole right in Adsit in this land was, as the assignee of Holmes, under a land warrant issued to Holmes and assigned to Adsit under the power of attorney. That power was simply void by the Act of Congress, set up in the bill. Holmes so claimed it, and assigned the land to Smith, the complainant and plaintiff in error, who avers in his bill that, by reason of that violation, he is entitled to the legal title and a conveyance of the land from the parties who had derived that legal title from Adsit, with notice. Whether the facts will sustain the right as set up, is one thing; but a right under an Act of Congress is specifically made in the pleadings of this case, and the decision of the State Court is *in totidem verbis* against that right. So that we have, both in the pleadings and the judgment of the court, this vital question fairly raised, and squarely denied of record.

Bridge Proprs. v. Hoboken Co., 1 Wall., 116 68 U. S., XVII., 571; *Brooks v. Martin*, 2 Wall., 86 (69 U. S., XVII., 737); *Dyke v. McFey*, 16 Ill., 41; *Rose v. Buckland*, 17 Ill., 309; *Isaacs v. Steel*, 3 Scam., 99; *Bruner v. Manlove*, 8 Scam., 340; *Brill v. Stiles*, 35 Ill., 308; *Smith v. Adsit*, 52 Ill., 412.

These cases sustain as well the jurisdiction of this court, as the point that the only remedy of Smith was in a court of equity, to compel a conveyance from the holders of the legal title, or to compel an account from Adsit.

Mr. Justice Strong delivered the opinion of the court:

We do not perceive that this case differs essentially from what it was in 1872, when it was dismissed for want of jurisdiction in this court to hear it. *Smith v. Adsit*, 16 Wall., 185 [88 U. S., XXI., 310]. In the Supreme Court of the State it was an appeal from an inferior court, in which it had been sought to enforce an alleged trust, by a bill in equity, and the bill was ordered to be dismissed, because the court

was of opinion no trust was proved. The record does not show that the question, whether the sale of the land-warrant was a nullity if made before the warrant issued, was passed upon, much less that it was decided against the complainant. The decree ordering the bill to be dismissed, must have been made, if it had been decided that the sale was void. Even then, it would have been necessary to establish the existence of a trust. What amounts to a trust, or out of what facts a trust may spring, are not federal questions, and on a writ of error to a State Court, we can review only decisions of federal questions.

The case is covered by Smith v. Adsit [supra], and the writ of error is dismissed.

JAMES S. RAY, Pub. Admr. of JAMES A. WILLARD, Deceased, *Plff. in Err.*,

v.
W. NORSEWORTHY ET AL.

(See S. C., 23 Wall., 128-137.)

Bankrupt's property, how sold—sale free of incumbrance—mortgage.

1. The property of a bankrupt may, in a proper case, be sold by order of the bankrupt court, free of incumbrance.

2. Creditors in such a proceeding must have due opportunity to defend their interests, and must be properly notified and summoned to appear for that purpose, or their rights will be unaffected by the proceedings.

3. A mortgage cannot be canceled and displaced in such proceedings without notice, nor without an opportunity to the mortgagee to be heard.

4. Sales of the bankrupt's interest merely, may be made without notice to the secured creditor; but if the assignee desires to sell the property free of incumbrance, he must obtain authority from the bankrupt court, and must see to it that all the creditors having liens on the property are duly notified, and that they have opportunity to adopt proper measures to protect their interests.

[No. 214.]

Argued Feb. 25, 1875. Decided Mar. 22, 1875.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is fully stated by the court.

Messrs. T. J. Durant and C. W. Horner. for plaintiff in error.

Messrs. E. T. Merrick and Geo. W. Race. for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

Except where the Constitution, treaties or statutes of the United States otherwise require or provide, the Supreme Court adopts the local law of real property, as ascertained by the decisions of the State Court, whether those decisions are grounded on the construction of the statutes of the State, or form a part of the unwritten law of the State, which have become a fixed rule of property. *Jackson v. Chase*, 12 Wheat., 167.

Parks owned one third of the plantation described in the petition, and it appears that he sold the same to Brigham, and that the latter, to secure the notes given for the consideration, executed a special mortgage to the grantor, with vendor's privilege on the land described in the

mortgage. Subsequently the mortgage notes were transferred to the first named petitioner, and it appears that the mortgagor became insolvent and went into bankruptcy, and that his assignees sold the mortgaged premises to the plaintiff, with five hundred acres of other lands, at a bankrupt sale, free of all incumbrances; and that the purchaser at that sale, in a few days thereafter, sold the same premises to the original owner, taking notes secured by a mortgage of the premises for the consideration. Credit was given for the payment of the notes, and the purchaser having failed to pay the notes, the mortgagee foreclosed the mortgage and proceeded to sell the premises, when the transferee of the first mortgage notes, having first caused his mortgage to be rendered executory, filed in the case what is known in the practice of the state courts as a "third opposition," claiming the proceeds of the premises by virtue of his special mortgage with vendor's privilege.

Such a proceeding is commenced by petition, and in this case the transferee of the first mortgage notes, with the other third opponents, allege that they held a special mortgage on the land with a vendor's privilege; that the same has been legally recognized and rendered executory by having passed into judgment and by a decree that the lands should be sold in order to pay the petitioners the sum specified in the petition; that the land is under seizure of the sheriff by virtue of a writ of seizure to pay their debt; that the land has also been seized and advertised to be sold by virtue of the suit between the plaintiff and the defendant; that the petitioners have the oldest mortgage on the same, together with the vendor's privilege; that their mortgage being first, they are entitled to claim the proceeds of the land as matter of preference over any mortgage right of the plaintiff to the amount of their debt, interest and costs; wherefore they pray for an injunction, and that the sheriff may be decreed to retain a sufficient amount of the proceeds of the sale to pay their debt.

Other mortgage creditors of the grantee of the original owner intervene; but it will not be necessary to refer with any more particularity to those proceedings, as they do not present any question for decision under the assignment of errors; nor will it be necessary to advert to more than one of the objections submitted by the plaintiff in his answer, to the claim that the proceedings of the sale of the land set up by the opponent in the present petition, for that is the only one which presents any question re-examinable here, either under the Judiciary Act or under a more recent Act regulating the jurisdiction of this court in such cases.

By his answer he denies that the petitioners have any mortgage of or privilege in the lands sold, and alleges that he acquired all the interest owned by the original defendant in the same by virtue of the sale made by the assignee in bankruptcy, free from all incumbrances, and that all mortgages thereon and privileges existing therein have been legally canceled and extinguished.

These references to the petition and answer are sufficient to show that the petitioner in such a proceeding assumes the position of a plaintiff, and that the plaintiff in the primary suit assumes in his answer *quoad* the petitioner,

the position of a defendant. Enough also appears to show that the petitioner claimed the fund by virtue of his being the transferee of the first mortgage notes with the vendor's privilege, and that the plaintiff claims the same fund, upon the ground that the assignee in bankruptcy sold the land free of all incumbrances.

Intervention was also made by other parties in opposition to the claim of the petitioners, but it will be sufficient to remark in regard to that proceeding, that they set up the same objection to the claim made by the petitioners as that pleaded by the plaintiff in the primary suit.

Proofs were taken on both sides, and the court of original jurisdiction entered a decree in favor of the petitioners as third opponents, upon the ground that the special mortgage with vendor's privilege under which they claimed, had never been canceled or extinguished, as alleged by the plaintiff in his answer to their petition. Due proceedings were immediately taken by the plaintiff to remove the cause into the Supreme Court of the State where the parties were again heard and the Supreme Court of the State affirmed the decree of the subordinate court, and adjudged and decreed that the mortgage claimed by the petitioners in their opposition be, and the same is hereby recognized and rendered executory upon the proceeds of the sale of the land described in their petition.

Since the cause was removed here by writ of error to the State Court, the plaintiff in the primary suit in the State Court assigns the following errors: 1. That the State Court was without jurisdiction over the title which he, the plaintiff, derived under the sale made by the assignee in bankruptcy. 2. That the State Court erred in deciding that the first named petitioner was not a party to the rule to cancel his mortgage and privilege, or to the proceedings in bankruptcy. 3. That the State Court erred in deciding that a hypothecary right existed in the petitioner after the discharged bankrupt was no longer bound for the debt. 4. That the State Court erred in annulling the proceedings in bankruptcy, and the title of the plaintiff under those proceedings. 5. That the State Court erred in awarding the fund arising from the sale of the land to the petitioners in the subordinate State Court.

Separate examination of those several propositions will not be attempted, nor is it necessary, as it is clear that they are all founded in the theory that the title of the petitioners under the first mortgage and privilege was extinguished by the decree of the bankrupt court, and that the plaintiff acquired an absolute title to the land from the assignee in bankruptcy, discharged of all prior incumbrances and privileges.

1. Jurisdiction of the bankrupt courts extends to all cases and controversies arising between the bankrupt and any creditors who shall claim any debt or demand under the bankruptcy, to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and the due administration of the assets among all the creditors. 14 Stat. at L. 517.

Powers of like kind were conferred upon the bankrupt courts by the former Bankrupt Act, and the provision in that regard is expressed in substantially the same terms. 5 Stat. at L., 445.

Cases involving the construction of that provision were several times removed into this court for re-examination, in all of which it was held that the power conferred extended to all cases where the rights, claims and property of the bankrupt, or those of his assignee, are concerned, because they were matters arising under the Act and were necessarily involved in the due administration and settlement of the bankrupt's estate. *Ex parte Christy*, 3 How., 313; *Norton v. Boyd*, 3 How., 437.

So where the bankrupt court ordered the mortgaged premises to be sold, and directed that the mortgages should be canceled and that the property should be sold free from incumbrance, rendering to the parties interested their respective priorities in the proceeds, this court decided that the bankrupt court did not exceed their jurisdiction, and affirmed their action. *Houston v. Bk.*, 6 How., 504.

Corresponding decisions were made by the State Court in construing the former Bankrupt Act, which are equally applicable to cases like the one before the court. *Clarks v. Rosenda*, 5 Rob. (La.), 39; *Conrad v. Prieur*, 5 Rob. (La.), 54; *Lewis v. Flak*, 6 Rob. (La.), 162.

Even if, by the true construction of the 1st section of the Act, any doubt could arise as to the power of the bankrupt court to authorize such a sale, it has been well held that it may be derived from the 20th section of the same Act. By that section it is provided that a creditor having a mortgage or pledge of real or personal property, or a lien thereon, for the security of a debt, shall be admitted as a creditor only for the balance of the debt, deducting the value of such property to be ascertained by agreement between him and the assignee, or by sale thereof, to be made in such manner as the court may direct. *In re Kirtland*, 10 Blatchf., 515.

Beyond all doubt the property of a bankrupt may, in a proper case, be sold by order of the bankrupt court free of incumbrance, but it is equally clear that in order that such a proceeding may be regular and valid the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts and circumstances which it is supposed justify the application, that the judge may decide whether or not the application shall be granted. Secured creditors in such a proceeding must have due opportunity to defend their interests and, consequently, must be properly notified and summoned to appear for that purpose. *Foster v. Ames*, 1 Low., 316; *Willard v. Brigham*, 25 La. Ann., 601.

None of these conditions were fulfilled in this case. Instead of that the State Court finds that the petitioner was never properly notified and that he was not made a party to the proceeding resulting in the order to sell the property in question free of his prior mortgage, and it was upon that ground that the State Court decided that his rights were unaffected by the proceedings.

Concede to the fullest extent the powers of the bankrupt court to do everything specified in the Bankrupt Act, still it is clear that the

mortgage and privilege of the petitioner could not be canceled and displaced without notice nor without an opportunity to be heard, nor could the proceeds of the sale be adjudged to a junior mortgagee with or without notice, unless for some cause other than what is disclosed in the record. *Peychaud v. Bk.*, 21 La. Ann., 262. Notice in some form must be given in all cases, else the judgment, order or decree will not conclude the party whose rights of property would otherwise be divested by the proceeding. *Wilson v. Bell (The Lottawanna)*, 20 Wall., 201 [87 U. S., XXII., 259]; *Nations v. Johnson*, 24 How., 205 [65 U. S., XVI., 632]; *Harris v. Hardeman*, 14 How., 339; *Borden v. Fitch*, 15 Johns., 141; *Buchanan v. Rucker*, 9 East, 192.

No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence without the privilege of showing, if he can, that the pretext for doing it is unfounded. Every person, as this court said in the case of *The Mary*, 9 Cranch, 144, may make himself a party to an admiralty proceeding and appeal from the sentence, but notice of the controversy is necessary in order to enable him to become a party. *Webster v. Reid*, 11 How., 460; *Boswell v. Otis*, 9 How., 350; *Oakley v. Aspinwall*, 4 N. Y., 515.

Authorities to the same effect are very numerous, nor is there any well considered case which gives any support to the proposition that the judgment, order, sentence or decree of a court disposing of property subject to conflicting claims will affect the rights of anyone not a party to the proceeding and who was never in any way notified of the pendency of the proceeding. *Weed v. Weed*, 25 Conn., 337; *Means v. Means*, 42 Ill., 50; *Hill v. Hoover*, 5 Wis., 386; *Wallis v. Thomas*, 7 Ves., 292; *Rockland Water Co. v. Pillsbury*, 60 Me., 427; *Lane v. Wheelan*, 46 Miss., 666; *Hettrick v. Wilson*, 12 Ohio St., 136; *Vallejo v. Green*, 16 Cal., 160.

Such a sale made in such a manner without notice may, under some circumstances, be set aside as violating the rights of the prior mortgagee; but the mortgagee may, if he sees fit, affirm the sale and proceed to enforce his priority against the proceeds of the sale, which is the real nature of the proceedings in this case. *Luvaudais v. Luvaudais*, 3 La. Ann., 454.

Authority is, doubtless, possessed by the assignee to sell the property of the bankrupt, whether the same is or is not incumbered, but when he sells incumbered property without any special order from the court he sells the same subject to any and all lawful incumbrances, and can convey no better or higher interest than the bankrupt could have done. In such a case it will be taken for granted that the assignee sold only such right or title to the property as was vested in him as the representative of the bankrupt and, therefore, that he sold it subject to the incumbrances.

Such sales may be made without notice to the secured creditor, but if the assignee desires to sell the property free of incumbrances he must obtain authority from the bankrupt court, and must see to it that all the creditors having liens on the property are duly notified, and that they have opportunity to adopt proper measures to protect their interests. *King v. Bowman*, 24

La. Ann., 506; Bump, Bankruptcy., 7th ed., 156; *In re Kirtland*, 10 Blatchf., 515.

Decree affirmed.

Mr. Justice Bradley was not present during the argument of this cause and took no part in the decision.

Cited—111 U. S., 742; 35 Ohio St., 14; 120 Mass., 85; 21 Am. Rep., 501.

MARSHALL B. BLAKE, COLLECTOR OF INTERNAL REVENUE, *Plff. in Err.*,

v.

THE NATIONAL CITY BANK OF NEW YORK.

(See S. C., 23 Wall., 307-321.)

Act of Congress, how interpreted—Act taxing banks.

1. This court may ascertain the legislative intention of an Act, by a recurrence to the mode in which amendatory words were introduced, as shown by the journals and records, and may give such construction to the statute as will carry out the intentions of Congress.

2. Under the Internal Revenue Act of July 14, 1870, the tax therein mentioned on dividends declared by banks cannot be levied or collected until 1871, but it may be imposed upon all dividends, additions or payments of interest made or declared after the passage of the Act of July 17, 1870.

[No. 553.]

Argued Feb. 19, 1875. Decided Mar. 22, 1875.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. Geo. H. Williams, Atty-Gen., and *S. F. Phillips, Solicitor-Gen.*, for plaintiff in error.

Messrs. Charles C. Beaman, Jr., and *Francis C. Barlow*, for defendants in error.

Mr. Justice Hunt delivered the opinion of the court:

The defendant in error brought an action in the Circuit Court of the United States for the Southern District of New York, to recover certain Internal Revenue taxes alleged to have been illegally assessed and collected. The taxes were upon dividends declared and made payable during the last five months of the year 1870. A jury was waived, and the court upon the trial gave judgment in favor of the Bank for the amount of the taxes paid, holding the assessment and collection of the same to have been illegal. From this judgment the present writ of error is brought.

The question is, whether dividends, additions to surplus and payments of interest made by corporations during either of the months of August, September, October, November or December, 1870, are subject to an internal reve-

nue tax of two and one half per cent. By the United States Statute of June 30, 1864, it was provided that an income tax of five per cent. should be imposed and collected upon the gains and profits of individuals, and upon the dividends and interests declared or paid by corporations.

The corporations referred to were required to make a report to the assessor on or before the 10th day of the month following the making of each dividend, and the tax was payable within thirty days thereafter.

As to individuals, it was directed that this tax should be levied on the first day of May in each year, and that the same should be due and payable on or before the 30th day of June in each year. It was also declared that the tax should be levied until and including the year 1870, and no longer.

18 Stat. at L., 283, secs. 119, 122, 116.

This tax, thus imposed, ended with and for the year 1869, the tax for each year being levied and collected in the year following. The Statute of 1867 provided that the tax on individual incomes should be levied on the first day of March, and be payable on or before the 30th day of April in each year, until and including the year 1870, and no longer.

14 Stat. at L., 480, sec. 18.

This was the condition of the matter when the Statute of July 14, 1870, was enacted. In brief, the Statute of 1864 had imposed an income tax which, with various modifications not important now to be considered, extended to and included such tax for the year 1869, and no longer.

This Act of July, 1870, was entitled "An Act to Reduce Internal Revenue Taxes and for Other Purposes."

In the sections not now under consideration, taxation was intended to be and was greatly reduced.

The sections with which we are immediately concerned are the 6th, 7th and 15th, and they are in substance as follows:

By section 6, it is enacted: "That there shall be levied and collected annually, as hereinafter provided for the years 1870 and 1871, and no longer, a tax of two and one half per centum upon the gains, profits and income of every person residing in the United States, and of every citizen of the United States residing abroad, derived from any source whatever, whether within or without the United States, except as hereinafter provided."

16 Stat. at L., 267.

By section 7, it is enacted: "That, in estimating the gains, profits and income of any person there shall be included all income de-

duced them to vote for or against its passage. U. S. v. Union Pac. R. R. Co., 91 U. S., *post*.

It is no part of the duty of the courts to inquire into the motives which actuated the Legislature in the passage of a given Act, although fraud and corruption be alleged. *People v. Draper*, 15 N. Y., 545; *Sudbury & Erie R. R. Co. v. Cooper*, 33 Pa. St., 282; *Ex parte Newman*, 9 Cal., 503.

An Act cannot be impeached in the courts for fraud in procuring its passage. *Englishbee v. Helmut*, 7 N. Y. Leg. Obs., 186.

Nor can the courts, for the purpose of impeaching a statute, go behind the records and inquire into the regularity of the proceedings of the Legislature in passing an Act. *People v. Devellin*, 33 N. Y., 209; *Falconer v. Campbell*, 2 McLean, 186.

NOTE.—Construction of statute; journals of the Legislature; views of individual members; motive of Legislature; fraud in passage.

Evidence of public embarrassment, the proclamation and message of the Governor, the journals of the House of Representatives and the reports of committees, should be wholly disregarded in construing a bank charter as to whether it exempted from taxation. *Bk. of Pa. v. Com.*, 7 Pa. St., 144.

Journals are not evidence of the meaning of a statute, because this must be ascertained from the language of the Act itself and the facts connected with the subject on which it is to operate. *Southwark Bk. v. Com.*, 26 Pa. St., 446.

In construing an Act of Congress, the court is not at liberty to recur to the views of individual members in debate, nor consider the motives which in-

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rived from * * * the gains, profits and income of any business, profession, trade, employment, office or vocation, including any amount received as salary or pay for services in the civil, military, naval or other service of the United States, or as senator, representative or delegate in Congress, except that portion thereof from which, under authority of Acts of Congress previous hereto, a tax of five per centum shall have been withheld."

16 Stat. at L.

Section 15 enacts: "That there shall be levied and collected for and during the year 1871, a tax of two and one half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date by any of the corporations in this section hereafter enumerated, and on the amount of all dividends of earnings, income or gains hereinafter declared, by any bank, trust company, savings institution, insurance company, railroad company, canal company, turnpike company, canal navigation company and slackwater company, whenever and wherever the same shall be payable and to whatsoever person the same may be due."

16 Stat. at L., 260.

The 16th section provides that an account shall be rendered by the corporation making a dividend, etc., to the assessor, on or before the 10th day of the month following a dividend, and that the tax shall be paid as required by law, which is within thirty days thereafter.

The language of the statute is too manifest to admit of a doubt that Congress intended to extend for two years the tax upon the incomes of individuals. Without further legislation the power to levy that tax expired with the year 1870. A tax for the year 1869 had been levied in March, 1870, under the authority of the laws referred to. No further levy could be made. It is then provided by section 6, that there shall be levied for the years 1870 and 1871, a tax upon individual incomes.

By the Statute of 1864, 13 Stat. at L., 283, that portion of the income of an individual derived from dividends on stocks, interest on corporate bonds, and the like, was directed not to be included in his return of gains and profits, and no tax was assessed to him directly for that portion of his income. Another section of the same statute provided that dividends of earnings, interest on corporate bonds, and the like, should be taxed to the corporation directly and in its name. While these items were passed over in the individual account, they were rigidly and searchingly sought out and taxed in the name of the corporation. We here find the explanation of that portion of the 7th section of the Act of 1870, which excepts from individual income as a subject of taxation "That portion thereof from which, under authority of Acts of Congress previous hereto, a tax of five per centum shall have been withheld."

Intending and expecting that this source of taxation would continue to be reached by the taxation upon corporations, it was intended that the individual should be relieved from the imposition.

From the examination of the Globe Cong. Jour. of the 41st Congress (p. 5518), and of the original Journal of the House of Representa-

tives, we learn that, as originally reported and passing the House, the words "For and during the year 1871," now making a part of the 15th section, were not in the bill; nor were there any corresponding words. The bill read:

"That there shall be levied and collected a tax of two and one half per centum on the amount of all interest or coupons, etc., * * * and on the amount of all dividends of earnings or gains * * * hereafter declared, whenever and wherever the same shall be payable, and to whatsoever person the same may be due."

As it thus stood, the imposition of the tax upon the dividends of corporations was unlimited as to time.

The same record shows that the Senate amended the 15th section by inserting after the word "collected" as follows:

"During the years 1871 and 1872."

So that it would read:

"Be it enacted that there shall be levied and collected during the years 1871 and 1872 a tax of two and one half per centum on the amount of all interest, etc."

Up to this point it stands that the House proposed to tax the corporations upon their dividends and coupons without limit as to time; while the Senate desired to fix their liability to the taxes to be levied and assessed during the years 1871 and 1872.

The record further shows that the House disagreed to this and to other amendments of the Senate. There were many points of difference. A committee of conference was appointed, the chairman of which, Mr. Schenck, reported to the House on the 13th day of July, among other things, "That the House receded from their disagreement to the 20th amendment of the Senate [which was the one above quoted], and agree to the same with the following amendment":

"Strike out said Senate amendment and insert in lieu thereof the following: 'for and during the year 1871.'"

Which was agreed to, and the section which we are now considering became a law in its present form.

Connected directly with this point is the provision of section 17 of the same Act, viz.: that sections 120, 121, 122 and 123 of the Act of June, 1864, as amended, shall be construed to impose the taxes therein mentioned to the first day of August, 1870, but after that date no further taxes shall be levied or assessed under the said sections.

These sections are the ones imposing the income tax of five per cent. upon corporations, and that tax is thus continued upon corporations until August, 1870, and no longer.

The journal and record show two other facts:

1. That the words "hereafter declared," in the 15th section of the Act of 1870, immediately following the words "dividends of earnings, income or gains," formed a part of the original bill as it passed the House and was sent to the Senate.

2. That the 17th section, by which it was enacted that the sections of the Statute of 1864 imposing the income tax of five per cent. upon corporations, should be construed to impose the taxes therein mentioned to the first day of August, 1870, but that after that date no further

tax shall be levied or assessed under those sections, formed no part of the original House bill. It was an amendment proposed on the part of the Senate, and agreed to by the House.

By section 15 it is declared that this tax of two and one half per cent. shall be imposed "on the amount of all dividends of earnings, income or gain hereafter declared" by any bank, railroad company, trust company, etc. All the dividends which shall be thereafter declared by any bank or railroad company shall be taxed. No time is limited within which the dividend is to be declared. No restriction is made except that it shall be "hereafter" declared, i.e., after the 17th of July, 1870, the date of the passage of the Act. The dividends in question were all declared after this date, and they fall within the general language made use of.

The first branch of the section directs the levying and collection of taxes on dividends for and during the year 1871; the latter branch imposes the tax upon all dividends thereafter declared.

Under these circumstances, we are compelled to ascertain the legislative intention by a recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records, and by giving such construction to the statute as we believe will carry out the intentions of Congress.

The intention of the House upon the record we have quoted is plain. That body proposed to tax all dividends thereafter declared by corporations, but yielded to the indisposition of the Senate to assent to that principle.

The Senate proposed to amend this principle: first, by the limitation of the tax of five per cent. to August, 1870; and second, by inserting the words "There shall be levied and collected during the years 1871 and 1872," which gave a tax of two and a half per cent. for those two years. The order in which these amendments were agreed to in the Senate is not easily ascertained. The record does not show the time of the adoption of the second amendment by the Senate. The Senate consented to say that the tax should be levied and assessed "during the years 1871 and 1872." The House agreed to the amendment by making it to read not only "during" but also "for" the year 1871, and omitting the year 1872, and the result appears in the Act we are considering.

This action does not correctly indicate the feeling of either body, as the House evidently wished to impose an extended tax, while the record shows that in several of its votes the Senate voted to abolish entirely the income tax, both as to individuals and as to corporations.

The defendant's construction of the 15th section assumes that Congress imposed the tax upon corporations, until August 1, 1870; that from that date till January 1, 1871, no tax was imposed, and that after that period the tax was again imposed; that there was a hiatus for five months. The tax upon individuals, meanwhile, was imposed during the whole of the years 1870 and 1871. It is impossible to believe Congress intended to make this discrimination. It is entirely unreasonable, and is not in harmony with the well known views of Congress on the subject.

The rate of taxation to August 1, 1870, was five per centum. Accordingly section 17 enacts
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that the taxation under sections 120, 121, 122, 123 of the Act of 1864, which would be at and after that rate, shall be paid by the corporations until August 1, 1870, but after that time no further taxes shall be levied or assessed under those sections. There is no enactment that the corporations shall not be taxed on dividends after August 1, 1870, but that the force of those sections shall extend no further. Subsequent taxes are by virtue of other authority. Each rate was intended to be provided for in this statute, as we find that the five per cent. may be collected by virtue of the 17th section, and the 15th section may be construed as saying that the tax shall be extended through the year 1871, and that the dividends thereafter declared during the year 1870 shall be subject to the tax of two and a half per cent.

The ambiguous terms of the statute prevent the possibility of a satisfactory solution of the question presented. We are inclined to adopt the construction practically placed upon it by the administrative department of the Government, which is this: that effect is to be given to the words "hereafter declared," by holding that they cover all the dividends and additions of the year 1870, after the passage of the Act; and that the words "levied and collected during the year 1871" relate to the time when the tax is to be enforced rather than as a limitation to the tax itself. Congress may have assumed that the dividends after August would not be declared until the end of the year should be nearly reached, and that they would be properly levied and collected in the year following. The statute hereinbefore quoted, showing that the tax upon individual incomes is to be levied and collected in the year following the period for which they are imposed by the statute, is an illustration of what these words may mean. The words in question do not necessarily limit the kind of property to be taxed or the period of time for which the tax is laid. The tax cannot be levied or collected until 1871, but it may be imposed upon all dividends, additions or payments of interest made or declared after the passage of the Act of July 17, 1870.

Judgment reversed.

The cases of MARSHALL BLAKE, Collector, v. THE FOURTH NAT. BANK [No. 554]; SAME Plff., v. THE NAT. PARK BANK OF N. Y. [No. 555]; JOHN B. KENNY, Collector, v. THE PHILA. & R. R. Co. [No. 318], involve the same principles as the case of *The National City Bk.*, and the judgment in each case is reversed.

Dissenting, Mr. Justice Davis, Mr. Justice Strong and Mr. Justice Bradley.

Cited—1 Holmes, 378, note.

WILLIAM MORAN ET AL., Plffs. in Err.,
v.

JOHN G. PRATHER.

(See S. C., 23 Wall., 492-508.)

Construction of instrument—parol evidence—evidence of surrounding circumstances—construction of guaranty—evidence of partnership—improper request for instruction—evidence of usage.

1. Words of an instrument which have reference to the usual transactions of life must be interpreted

according to their plain, ordinary and popular meaning, and parol evidence is not admissible to contradict or vary such an instrument.

2. Parol evidence is inadmissible to show that "steamboat debts" in an instrument mean only such debts as constitute a lien on the steamboat for materials and supplies.

3. Evidence that plaintiff's interest in a steamboat was worth much more than the amount for which the same was sold, and that it was understood at the time of the sale that the purchaser should assume and protect the plaintiff from all existing debts of the vessel and give a bond to that effect, was admissible to show the surrounding circumstances at the time the bill of sale was executed, and which induced the purchaser to give such bond.

4. A guaranty on such sale, by defendant, to save plaintiff harmless from any claims and demands that may arise or be brought against said boat only included such as the plaintiff was liable for at the time of such sale.

5. Partnership may be proved by parol as well as by written evidence.

6. A request for instruction is properly refused which sets up an erroneous theory of the guaranty which is the foundation of the suit.

7. Usage, which is inconsistent with the terms of a contract, cannot be incorporated into it.

[No. 215.]

Argued Feb. 25, 1875. Decided Mar. 22, 1875.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is sufficiently stated in the opinion of the court.

Messrs. W. P. Bell, W. D. Davidge and Bentinck Egan, for plaintiffs in error.

Messrs. Montgomery Blair and P. Phillips, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Indemnity is claimed of the defendants by the plaintiff, for certain sums of money which he was compelled to pay for certain debts due to the creditors of the steamboat named in the pleadings, and to the creditors of her owners contracted prior to the time he sold his interest in the steamboat, as alleged in the petition.

As one of the builders he became the owner of one eighth of the steamboat; and he increased his interest in the enterprise in virtue of two purchases, by which he became with his priorities the owner of more than one half. When he made his second purchase he gave a bond to the vendor as a part of the consideration of the sale, stipulating to save him free and harmless from all the debts of the steamer and her owners, contracted prior to the date of the sale, and to re-imburse him for any and all such debts then existing as he should be compelled to pay on account of his having been an owner of the steamboat.

For a certain time the plaintiff and his co-owners used and employed the steamboat in navigation. Debts were also contracted in behalf of the steamboat during that period, and the plaintiff subsequently sold all his interest in the steamboat for the sum of \$6,000; the purchaser contracted to assume and pay all the debts against the steamboat in full force and not released, and to protect the plaintiff as the vendor from the payment of all such existing liabilities.

Pending the negotiations for the sale and purchase, certain creditors of the steamboat executed a release to the plaintiffs from all debts of the kind due to them on account of the steamboat, which debts of course were not included in the contract for indemnity between the

plaintiff and the purchaser. Pursuant to the agreement between the plaintiff and the persons proposing to purchase, the plaintiff executed to the purchaser a bill of sale of all his interest in the steamboat, and the defendant, as the guarantor of the purchaser, executed to the plaintiffs an agreement in writing, binding themselves and their heirs *in solido* to defend the plaintiff and save him "Free and harmless of any and all claims and demands that may arise or be brought against said steamboat," except those previously released.

Two judgments were subsequently recovered by the creditors of the steamboat against the vendor of the plaintiffs in his second purchase, for debts contracted before that purchase and sale, which the plaintiff was obliged to pay by virtue of his contract of guaranty given to his vendors.

Compelled to pay the amount under those circumstances, the plaintiff demanded indemnity from the defendants, and they having refused to comply with the demand, he commenced the present suit to recover the amount.

Service was made and the defendants appeared and filed separate answers, denying all the material allegations of the petition; depositions were taken, and the parties went to trial, and the verdict and judgment were for the plaintiff. Exceptions were filed and the defendants removed the cause into this court.

Two of the exceptions relate to the objections taken to the sufficiency of the original petition of the plaintiff, which do not require any special examination for two reasons: 1. Because the defendants subsequently pleaded to the merits and went to trial, which is a waiver of such an objection. 2. Because the objections are without merit, as the petition is sufficient to warrant the verdict and support the judgment.

Certain other errors are assigned, of more importance, which will be noticed in their order:

(1) That the circuit court erred in excluding the evidence offered by the defendants that the words "steamboat debts" mean such debts as constitute a lien or privilege on the steamboat for necessary supplies, materials, repairs and wages; that they do not include debts which cannot be enforced against the steamboat by any of the conservatory laws of the State. (2) That the court erred in admitting the testimony offered by the plaintiff that the steamboat, at the time of the sale, was a very valuable vessel; that the interest of the plaintiff was worth much more than the amount for which it was sold, and that it was understood at the time of the sale that the purchaser should assume and protect the plaintiff from all existing debts of the steamboat, and that the purchaser should give a bond to that effect. (3) That the instructions given to the jury were erroneous. (4) That the court erred in refusing to instruct the jury as requested by the defendants.

1. Cases arise, undoubtedly, in which the testimony of expert witnesses is admissible to explain terms of art and technical words or phrases, and it may be admitted that a written instrument may be so interspersed with such technical terms that it would be error in the court to exclude the testimony of persons skilled in such matters, if duly offered by the proper party in the litigation. *Seymour v. Osborne*, 11 Wall., 546 [78 U. S., XX., 39].

Terms of art, in the absence of parol testimony, must be understood in their primary sense, unless the context evidently shows that they were used in the particular case in some other and peculiar sense, in which case the testimony of persons skilled in the art or science may be admitted to aid the court in ascertaining the true intent and meaning of that part of the instrument, but the words of the instrument which have reference to the usual transactions of life must be interpreted according to their plain, ordinary and popular meaning; and the rule is that parol evidence is not admissible to contradict or vary such an instrument. 1 Greenl. Ev., 12th ed., sec. 285; 1 Taylor, Ev., 6th ed., sec. 867.

Difficulty will sometimes arise in determining whether the particular term or phrase in question is used in a technical or in a popular sense, but the court is of the opinion that no such difficulty is presented in this investigation. Instead of that, it is quite clear that neither the words of the guaranty given by the plaintiff to his vendor when he made his second purchase, nor the words used in the guaranty given by the defendants to the plaintiff are either doubtful or ambiguous; nor are the words of either of those contracts of a character to afford the slightest support to the proposition that parol testimony of any kind would be admissible to contradict, vary or to unfold or expound their ordinary signification and meaning.

By the allegation of the petition it appears that the plaintiff, when he made his second purchase, bound and obligated himself to hold his vendor free and harmless of all debts of the steamboat and owners, existing against the steamboat at the date of the sale, and to reimburse him for any and all debts then existing that he should be compelled to pay on account of his having been an owner of the same. Language equally clear, comprehensive and decisive is employed in the guaranty given by the defendants to the plaintiff when he transferred his entire interest to the person in whose behalf the defendants executed the guaranty which is the foundation of the present suit. Subject to the exception before stated they bound themselves and their heirs *in solido* to defend the plaintiff, and save him free and harmless of any and all claims and demands that may arise or be brought against the steamboat, which language is neither technical nor ambiguous, and it certainly falls within that class of expressions which by all the authorities must be interpreted according to their plain, ordinary and popular meaning. 2 Taylor, Ev., 6th ed., sec. 1034; *Robertson v. French*, 4 East, 185.

Where the words of any written instrument are free from ambiguity in themselves, and where the external circumstances do not create any doubt or difficulty as to the proper application of the words to the claimants under the instrument, or the subject-matter to which the instrument relates, such an instrument, said Tindal, *Ch. J.*, is always to be construed according to the strict, plain, common meaning of the words themselves, and that in such cases evidence *dehors* the instrument for the purpose of explaining it, according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. *Shore v. Wilson*, 9 Cl. & F., 565; *Mallan v. May*, 18 Mees. & W., 517.

All the facts and circumstances may be taken See 23 WALL.

into consideration, if the language be doubtful, to enable the court to arrive at the real intention of the parties, and to make a correct application of the words of the contract to the subject-matter and the objects professed to be described, for the law concedes to the court the same light and information that the parties enjoyed, so far as the same can be collected from the language employed, the subject-matter, and the surrounding facts and circumstances. Add. Cont., 6th ed., 918.

Ambiguous words or phrases may be reasonably construed to effect the intention of the parties; but the province of construction, except when technical terms are employed, can never extend beyond the language employed, the subject-matter, and the surrounding circumstances. *Nash v. Towne*, 5 Wall., 689 [72 U. S., XVIII., 527].

Apply that rule to the case and it is clear that the evidence offered by the defendants was properly excluded, and that the exception under consideration must be overruled.

2. Evidence was introduced by the plaintiff at the trial that his interest in the steamboat was worth much more than the amount for which the same was sold, and that it was understood at the time of the sale that the purchaser should assume and protect the plaintiff from all existing debts of the vessel and give a bond to that effect. Exception was taken by the defendants to the ruling of the court in admitting that testimony, which ruling is the foundation of the next assignment of errors.

Parol evidence is certainly not admissible to contradict, vary or control a written contract, but the evidence in question in this case is not subject to any such objection, whether applied to the guaranty given by the plaintiff to his vendor or to the bill of sale given to the plaintiff by the purchaser of his interest in the steamboat. Much less was paid for that interest than its market value, the evidence of which was properly admissible as showing the surrounding circumstances at the time the bill of sale was executed, and also to show the circumstances which induced the purchaser to give the guaranty executed by the defendants.

3. Specifications of error under the third assignment are quite too numerous to be separately examined, nor is such an examination necessary, as most of them involve the same question or some phase of the same question, as that contained in one or the other of the two preceding assignments.

They, the defendants, insisted in the court below, and still insist, that the phrase "steamboat debts" is a technical phrase, and that it did not include any debts except such as constitute a lien on the steamboat. Attempt is made to set up that theory by exceptions to the charge, as well as by exceptions to the rulings of the court, but several answers may be given to the theory, either of which is sufficient to show that the exceptions are not well founded: (1) That the language of the guaranty is not correctly reproduced. (2) That the phrase referred to is not a technical phrase, within the meaning of the rules of evidence applicable in such cases. (3) That, by the true construction of the guaranty it includes all existing debts contracted for repairs, supplies and running expenses for and on account of the steamboat, for which the

plaintiff, as owner, was liable at the time of the sale and purchase.

Evidently the object of the agreement of guaranty was to secure the plaintiff against all liability arising from his part ownership of the steamboat. It was his liability and not that of the steamboat which was to be protected from "all claims and demands that may arise or be brought against the steamboat."

4. Certain requests for instruction were also presented by the defendants which were refused by the presiding justice, and the court here is of the opinion that all of them were properly refused.

Partnership may be proved by parol as well as by written evidence, which is sufficient to show that the ruling of the circuit judge in refusing the first request is correct, and enough has already been remarked in response to the first exception to show that the other requests for instruction were properly refused, for the plain reason that every one of them sets up an erroneous theory of the guaranty which is the foundation of the suit.

Evidence of usage was offered by the defendants to limit the legitimate scope and operation of the instrument of guaranty, but it was excluded by the court for reasons so manifestly proper that no argument is necessary to vindicate the action of the court. *Thompson v. Riggs*, 5 Wall., 679 [72 U. S., XVIII., 707]; *Biven v. N. E. Screw Co.*, 28 How., 431 [64 U. S., XVI., 513]; Add. Cont., 6th ed., 935.

Usage cannot be incorporated into a contract which is inconsistent with the terms of the contract; or, in other words, where the terms of a contract are plain, usage cannot be permitted to affect materially the construction to be placed upon it; but when the terms are ambiguous, usage may influence the judgment of the court in ascertaining what the parties meant when they employed those terms.

Apply those rules to the case and it is clear that the theory of the controversy assumed by the circuit judge in all his rulings and in the instructions which he gave to the jury is correct. Conclusive proof of that proposition is found in the language of the guaranty, by which the defendants covenanted to save the plaintiff free and harmless of any and all claims and demands that may arise or be brought against the steamboat, except such as were relinquished by the instrument in writing, executed on the same day.

Judgment affirmed.

Mr. Justice Bradley was not present during the argument of this cause and took no part in the decision.

SARAH ANN RANDALL, *Appt.*,

v.

LOUIS KRIEGER.

(See S. C., 23 Wall., 137-150.)

Statute validating conveyances of land—vested rights.

1. There is nothing in the Constitution of the United States which prohibits the Legislature of a

NOTE.—Acknowledgment of deed by married woman; parol evidence to contradict; interested officer. See note to *Drury v. Foster*, 69 U. S., XVII., 780.

State from passing an Act which divests rights vested by law, provided its effect be not to impair the obligation of a contract.

2. A Legislature may pass laws giving validity to past deeds of land, which were before ineffectual, such as a law validating an ineffectual acknowledgment of a married woman.

3. Such laws do not violate vested rights. There can be no vested right to do wrong.

[No. 216.]

Submitted Mar. 2, 1875. Decided Mar. 29, 1875.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

Suit was brought in the District Court of Minnesota by the appellant, to recover dower on certain lands. Upon petition of the plaintiff, the case was subsequently removed to the court below. A decree having been rendered in favor of the defendant, the plaintiff took an appeal to this court.

The case is fully stated by the court.

Mr. Lorenzo Allis, for appellant:

The statutory formalities of the execution and acknowledgment of a deed by a married woman, affecting her real estate, are part of the execution of the deed, and not mere matters of proof or evidence of such execution.

Drury v. Foster, 2 Wall., 83 (69 U. S., XVII., 781); *Dodge v. Hollinshead*, 6 Minn., 25; *Kirk v. Dean*, 2 Binn., 341; *Thompson v. Morrow*, 5 S. & R., 289; *Powell v. Monson*, 3 Mason, 351, 360.

By the common law, a married woman cannot convey her lands by deed, either with or without the concurrence of her husband. She can, therefore, convey her lands or bar her dower, only in the mode provided by statute.

A statute enabling a married woman to convey her lands or bar her dower by joining in a deed with her husband, does not enable her to convey her lands or bar her dower by letter of attorney nor by a bond for a deed nor by an agreement to convey; nor in any other mode than the one expressly designated by statute, viz.: by joining with her husband in a deed executed as required by statute.

Sumner v. Conant, 10 Vt., 9; *Earle v. Earle*, 1 Spencer, 347; *Shanks v. Lancaster*, 5 Gratt., 110; *Cox v. Wells*, 7 Blackf., 410; 1 Hill. Real Prop., p. 89, sec. 16, p. 125, sec. 29, *et seq.*; 2 Hill. Real Prop., p. 287 sec. 49, and notes, and authorities cited; 1 Greenl. Cruise, pp. 202-204, tit. 6, ch. 4, secs. 13, 14, 19; 1 Washb. Real Prop., pp. 198-204, marg.; book 1, ch. 7, sec. 4, subd. 7-17, especially sub. 12-16; *Thompson v. Morrow*, 5 S. & R., 289; *Powell v. Monson*, 3 Mason, 347; *Johnston v. Vandyke*, 6 McLean, 423; *Ins. Co. v. Bay*, 4 N. Y., 9; *Morris v. Garrison*, 27 Pa., 226.

The Legislature cannot declare that a past act, done by a married woman shall bar her dower, which, when done, did not bar her dower; nor that a past act, done by a married woman, shall be valid and binding which, when done, she was absolutely without any capacity to do.

The concurrence of marriage and seisin vests in the wife such a right in the lands of her husband as cannot be impaired by subsequent legislation.

Lawrence v. Miller, 2 N. Y., 245; *Johnston v. Vandyke*, 6 McLean, 423; 4 Kent, 35, 36, 50 (marg.)

Messrs. J. V. D. Heard, George L. Otis and Henry J. Horn, for appellee:

The Curative Act of the Legislature of Minnesota of Feb. 24, 1857, was valid and constitutional.

Until the death of the husband, the right of dower of the wife is inchoate.

This inchoate right is not founded on contract, nor is it a vested estate in the land. There is, therefore, no constitutional restraint upon the Legislature to modify nor abrogate nor repeal such a right (so long as it remains inchoate) by retrospective laws.

If the Legislature possesses this power, it is certainly exercised very properly and equitably in curative and remedial statutes; the effect of which is generally to carry out the original intention or design of the parties by removing technical objections which, if permitted, would frustrate such original design or intention.

It was competent, therefore, for the Legislature to say, as respects all inchoate rights of dower, as it did by the Act of 1857, that deeds executed under a joint power of attorney from the husband and wife shall be binding; and if binding, the claim of the wife here to dower is barred, for she joined in the power of attorney under which the deed was made.

See this case (*Randall v. Krieger*,) in 2 Dill. in circuit court, pp. 447, 448, and see case generally pp. 444-448; also, *Underwood v. Lilly*, 10 Serg. & R., 97; *Barnett v. Barnett*, 15 Serg. & R. 72; *Tate v. Stooltsfoos*, 16 Serg. & R., 55; *Chemut v. Shane*, 16 Ohio, 599; *Raverty v. Fridge*, 8 McLean, 230; *Matthewson v. Spencer*, 3 Sneed, 513; *Rainey v. Gordon*, 6 Humph., 345; *Nord v. Ewing*, 9 Ind., 87. and authorities cited by the court; *Frantz v. Harrow*, 13 Ind., 507; *Glabreath v. Gray*, 20 Ind., 290; *Lucas v. Sawyer*, 17 Ia., 517; *Satterlee v. Matthewson*, 2 Pet., 380; *Watson v. Mercer*, 8 Pet., 88.

The decided weight of authority is in favor of the doctrine that the right to dower may, at any time before the husband's death, be enlarged, abridged or entirely taken away."

Lucas v. Sawyer, 17 Ia., 521, and authorities therein referred to; 2 Scribner, Dower, 354-366; Cooley, Const. Lim., 373-378.

"The inchoate right of dower of a married woman exists, not as a part of the marriage contract, but as a positive institution of law incident to the marriage relation. It is not an estate, but a mere contingent claim, not capable of sale on execution, nor the subject of grant or assignment."

Moore v. City of N. Y., 8 N. Y., 110.

Mr. Justice Swayne delivered the opinion of the court:

There is no controversy between the parties as to the facts. The appellant is the widow of John Randall, deceased, and claims dower in the premises described in the bill. They were married prior to the year 1848. He died in July, 1869. From the time of their marriage until his death they lived in the State of New York, and she has since continued to live there.

He was seized in fee simple of the land in which dower is claimed, until he conveyed it away as presently stated. On the 11th of April, 1849, he and the complainant executed a power of attorney of that date to William H. Randall, whereby the latter was authorized to sell and convey the real estate therein described. The

See 23 WALL.

description included the premises described in the bill. This instrument was executed in New York according to the law of that State, and was duly recorded in Minnesota. On the 16th of January, 1855, William H. Randall, as the attorney of John Randall and wife, and in their names, by deed of warranty of that date, conveyed the premises described in the bill to Truman M. Smith. This deed was executed in Minnesota in conformity to the local law. Krieger deraigned title from Smith through *mesne* conveyances reaching back to the latter. John Randall and wife revoked their power of attorney to William H. Randall, by an instrument duly executed bearing date the 28th day of May, 1859. Appellant is the sole legatee of her husband. He gave her his entire estate. He left no real property. The estate consisted of personal effects exclusively, and was of the value of from one to two hundred thousand dollars. The appellant has received, under the will from the executors, \$50,000. The agreed value of the premises described in the bill, exclusive of the improvements put on them since the conveyance to Smith, is over \$7,000.

When the power of attorney was given, there was no law of Minnesota authorizing such an instrument to be executed by husband or wife, or the attorney to convey under it.

On the 24th of February, 1857, the Legislature of Minnesota, then a Territory of the United States, passed an Act, which is as follows: "A husband and wife may convey, by their lawful agent or attorney, any estate or interest in any lands situate in this Territory; and all deeds of conveyance of any such lands, whether heretofore or hereafter made under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made and executed by the original parties."

The validity of the deed to Smith, as respects John Randall, is not questioned; but its efficacy as to the appellant is denied. Her claim to dower is resisted upon the following grounds: 1. That when the deed to Smith was executed, a non-resident widow was dowable, under the Statutes of Minnesota, only of lands whereof her husband died seized. 2. That the deed executed by the attorney to Smith was sufficient, under the then existing law of Minnesota, to bar this demand. 3. That the deed to Smith containing a warranty, and the appellant having accepted under the will, she is thereby estopped from asserting this claim for dower. 4. That the defect in the deed to Smith was remedied by the Curative Act of 1857.

We have found it necessary to consider only the point last named.

It is not objected that the Act of 1857, as regards its application to the present case, is in conflict with the Constitution of the State. We have carefully examined that instrument and have found nothing bearing upon the subject.

Nor was the Act forbidden by the Constitution of the United States.

There is nothing in that instrument which prohibits the Legislature of a State or Territory from exercising judicial functions, nor from passing an Act which divests rights vested by law, provided its effect be not to impair the obligation of a contract. Contracts are not im-

paired but confirmed by curative statutes. *Satterlee v. Matthewson*, 3 Pet., 880; *Watson v. Mercer*, 8 Pet., 110.

Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one *sui generis*. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither canceled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfill by one of the parties, as in cases of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptance of the term, that exists is, that the consent of the parties is necessary to create the relation. It is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else. An eminent writer has said it is the basis of the entire fabric of all civilized society. Story, Conf. L., sec. 109.

By the common law, where there was no ante-nuptial contract, certain incidents belonged to the relation.

Among them, were the estate of tenant by the courtesy on the part of the husband if issue was born alive and he survived the wife; and on her part, dower if she survived the husband. Dower by the common law was of three kinds: *Ad ostium ecclesie*, *Ex assensu patris*, and that which in the absence of the others the law prescribed. The two former were founded in contract. The latter was the creature of the law. Dower *Ad ostium ecclesie* and *Ex assensu patris* were abolished in England by a statute of the 8d and 4th William IV., ch. 105. The dower given by law is the only kind which has since existed in England, and it is believed to be the only kind which ever obtained in this country.

During the life of the husband, the right is a mere expectancy or possibility. In that condition of things, the law making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish or otherwise alter it or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs, the law of descent and distribution may be molded according to the will of the Legislature.

Laws upon those subjects in such cases take effect at once, in all respects as if they had preceded the birth of such persons then living. Upon the death of the husband and the ancestor the rights of the widow and the heirs become fixed and vested. Thereafter their titles respectively rest upon the same foundation, and are protected by the same sanctions as other rights of property. 2 Scrib. Dower, pp. 5-8; *Lawrence v. Miller*, 1 Sandf. S. C., 516; *S. C.*, 2 N. Y., 245; *Noel v. Ewing*, 9 Ind., 87; *Lucas v. Sawyer*, 17 Iowa, 517; *White v. White*, 5 Barb., 474; *Vartie v. Underwood*, 18 Barb., 561.

The power of a Legislature, under the circumstances of this case, to pass laws giving validity to past deeds which were before ineffectual is well settled. Sedg. Stat. and Const. L., 183; Cooley, Const. Lim., 376.

In *Watson v. Mercer*, *supra*, the title to the premises in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to her husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of the 30th of May, 1785. It was fatally defective as to the wife, in not having been acknowledged by her in conformity with the provision of the Statute of Pennsylvania of 1770, touching the conveyance of real estate by *femes covert*. She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises and recovered. The Supreme Court of the State affirmed the judgment. In 1826 the Legislature passed an Act which cured the defective acknowledgment of Margaret Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the Supreme Court of the State, and the judgment of affirmance was affirmed by this court. This case is conclusive of the one before us. See, also, *Caldor v. Bull*, 3 Dall., 388; *Wilkinson v. Leland*, 2 Pet., 627; *Livingston v. Moore*, 7 Pet., 486; *Kearney v. Taylor*, 15 How., 495; *Chestnut v. Shane*, 16 Ohio, 599; *Goshorn v. Purcell*, 11 Ohio St., 641; *Watson v. Bailey*, 1 Binn., 477; *Gibson v. Hibbard*, 18 Mich., 215; *Foster v. Bk.*, 16 Mass., 245; *State v. Newark*, 3 Dutch., 197.

To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is, the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the courts the vested right is usually unattended with the slightest equity. Cooley, Const. Lim., 378.

There is nothing in the record persuasive to any relaxation in favor of the appellant of the legal principles which, as we have shown, apply with fatal effect to her case. The curative Act of 1857 has a strong natural equity at its root. It did for her what she attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid.

The purchase money for the lot became a part of his estate, and the entire estate was given to her at his death. Not satisfied with this she seeks to fasten her dower upon the property in question.

The Act accomplished what a court of equity, if called upon, would have decreed promptly as to the husband, and would have failed to decree as to the wife only from the want of power. The unbending rule of law as to *femes covert* in such cases would have prevented it. The Legislature thus did what right and justice de-

manded, and the Act strongly commends itself to the conscience and approbation of the judicial mind.

The decree of the Circuit Court is affirmed.

Cited—8 Hughes, 291; 25 Minn., 464.

AUGUSTIN J. AMBLER, *Appt.*,

v.

RODNEY M. WHIPPLE ET AL.

(See S. C., 23 Wall., 278-288.)

Rehearing, when granted—imperfect record.

1. No rehearing is granted unless some member of the court who concurred in the judgment expresses a desire for it, and not then unless the proposition receives the support of a majority of the court.

2. But if the hearing in this court was had on an imperfect record, and a large part of the material evidence which was before the court below was omitted in the transcript certified to this court, and there was no laches or neglect of the appellee in failing to examine and procure the record to be perfected before the hearing, it presents a strong appeal for re-argument, which the court will consider.

[No. 24.]

Motion filed Mar. 5, 1875. Decided Mar. 29, 1875.

APPEAL from the Supreme Court of the District of Columbia.

On petition for rehearing.

This case was decided earlier in the present term, as reported in 87 U. S., 546, XXII, 403. Motion was now made by Mr. M. H. Carpenter, for the appellees, against whom decision had been rendered for a rehearing, on the ground that the records upon which the case was heard were very imperfect; and affidavits were presented to explain away any appearance of laches on the part of the appellees, and not having the said records sooner corrected.

The case was first brought to this court in December Term, 1871. Mr. James Hughes then appeared for the appellee, and upon Feb. 19, 1872, obtained an order dismissing the appeal because the appellants had failed to file the records required by the 9th Rule of the court. On Mar. 1, 1872, Mr. B. F. Butler moved to strike out that order and to re-instate the case, and thereupon one week was granted to Mr. Hughes, at his request, to examine the transcript offered for filing, and on Mar. 8 the time for such examination was extended to Mar. 22, 1872. On the later date Mr. Paschal again made the motion to strike out the order of Feb. 19, and to re-instate the case upon the docket, which motion was granted. Mr. Hughes having subsequently died, other counsel were substituted for the appellees, and the case remained on the docket until it was decided at the present Term.

Mr. Justice Miller delivered the opinion of the court:

It is the well settled rule of this court, to which it has steadily adhered, that no rehearing is granted unless some member of the court who concurred in the judgment, expresses a desire for it, and not then unless the proposition receives the support of a majority of the court. For this reason, and for the better reason that the pressure of business in the court does not

permit it, no reply to the petition whatever is allowed from the other side or given by the court.

The petition for rehearing in this case presents some features which seem to require a departure from this rule. It states that the hearing in this court was had on an imperfect record, that a large part of the matter which was before the court below having been omitted in the transcript certified to this court, and it attempts to show by affidavits that owing to the death of one counsel and the substitution of others, there was no laches or neglect for which the appellee should be held responsible in failing to examine and perfect the record before the hearing. A transcript of the parts of the record which were omitted in the first transcript accompanies the petition for rehearing.

If this statement be correct, and if the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for re-argument; and we have, therefore, given a careful consideration to the very full petition for rehearing, and availed ourselves of its copious references to the original and supplemental transcripts.

But an examination of the proceedings in the case in this court sheds much light on a question suggested in the affidavits. It appears that the appeal was docketed and dismissed Feb. 19, 1872, because the record had not been filed within the time limited by the rule of the court. On the 1st of March, a motion to set aside that order was made, when Mr. Hughes obtained time for one week to examine the transcript proposed to be filed, and it is within the recollection of the court, that this was on the ground that it was an incomplete record. On the 8th of March, he had an extension of time for this examination, to the 22d, which made three weeks allowed for that purpose, and on that day the order of dismissal was set aside and the case docketed on the transcript on which it was finally heard. The case was reached for argument at the October Term of 1873, and continued without objection; and on the 15th of October, 1874, was passed until the 18th of November by consent, and heard on the 16th and 17th of that month. These facts, which are of record in this court, show that the sufficiency of the transcript on which the case was heard had been a matter of careful consideration by counsel for petitioners, and that it was finally accepted and filed, and that for two years and a half it remained on the docket and no attempt to correct it by *certiorari* or otherwise was made. It cannot be said, in the face of these facts, even if the omitted parts of the record were material, that appellee was without fault in failing to have it brought up.

But we have no doubt that Mr. Hughes, who was an experienced and careful lawyer, was satisfied, as we are, from an examination of this additional transcript, that it was wholly immaterial to any issue in the cause.

It consists of commissions to take depositions, orders fixing the time by extension or otherwise of taking testimony of rules upon the parties to do various things preparatory to a final hearing which do not affect the merits of the case. It is filled with matter showing Ambler to have been drunk, vicious, negligent, and in contempt of the court, in the progress of the case. In short,

if his cause was to be tried on his merits instead of the merits of his case, it shows enough, as the original record did, to defeat it.

All this is only in aid of the theory on which Whipple has rested his case and lost it, namely: that because Ambler was a very bad man, a drunkard and a convicted felon, that he, his trustee and partner, could take to himself all the benefit of Ambler's skill and labor, disregard his double relation as trustee and partner, and violate every principle which governs these confidential relations.

The only error of fact pointed out in the opinion of the court, which is sustained by the record, is that Ambler, instead of leaving Washington about the 20th of August, the date of the successful experiment, did not leave the city until September the 1st, a difference wholly without influence on the points decided.

We remain of the opinion that the decree of this court was right, and the petition for rehearing is denied.

THE UNION PAPER COLLAR COMPANY,

Appt.,

v.

ISAAC VAN DEUSEN ET AL., Partners as
VAN DEUSEN, BOEHMER & CO.

(See S. C., "Collar Company," 23 Wall., 530-536).

Re-issued patent, when invalid—testimony to enlarge—Commissioner's decision, when not final—Evans' original and re-issued patent void—patent for invention—Gray's patent.

1. A re-issued patent, which is not for the same invention as the original, is invalid even if the patentee was the original and first inventor of the improvement described in the original patent.

2. Parol testimony is not admissible, in an application for a re-issued patent, to enlarge the scope and effect of the invention beyond what was described, suggested or substantially indicated in the original specifications, drawings or Patent Office model.

3. The purpose of a surrender and re-issue is not to introduce new features, ingredients or devices, but to render effectual the actual invention for which the original patent should have been granted.

4. Unless, however, it is apparent upon the face of the new patent that the commissioner has exceeded his authority, his decision is final and conclusive, except that, if there is such repugnancy between the old and the new patent that it must be held, as matter of legal construction, that the re-issued patent is not for the same invention as that embraced and secured in the original patent, then the re-issued patent is invalid.

5. Whether a re-issued patent is for the same invention as the surrendered original or for a different one, must be determined very largely by a comparison of the two instruments.

6. The original patent to Evans and the re-issue of it have substantially nothing in common, in the description of the invention which they respectively profess to secure, and his re-issued patent is, therefore, invalid.

7. Usually, the patent when introduced is *prima facie* evidence to show that the patentee is the first inventor, but the representations of the specification may be such as to afford satisfactory proof that the alleged invention is neither new nor useful.

8. Nothing short of invention or discovery will support a patent for a manufacture, any more than for an art.

9. Evans' original patent for paper collars was void, as he never made any invention or discovery upon the subject.

10. Gray is not the original and first inventor of the patented improvement in paper collars described in either of the claims of his patent.

[No. 221.]

Argued Mar. 5, 1875. Decided Mar. 29, 1875.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is fully stated in the opinion of the court.

Messrs. C. A. Seward and Charles C. Morgan, for appellant:

In *Seymour v. Osborne*, 11 Wall., 542 (78 U. S., XX., 38), it was held that the crucial test of the only question which remains after the commissioner has re-issued a patent, is this: "Is there such a repugnancy between the old and the new patent that it must be held, as a matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent?" No such repugnancy can exist in the present case, for the reason that it is the identical paper in the form of a collar that is embraced in both patents.

These views seem to be abundantly sustained in *Milligan, etc., Glue Co. v. Upton*, 6 Pat. Off. Gaz., 838; and *Goodyear D. V. Co. v. Smith*, 5 Pat. Off. Gaz., 587.

In *Curtis on Patents* (sec. 27, n. 2), the following remark of *Lord Chief Justice Abbott* is quoted:

"The best definition of the term 'manufacture' as the subject of a patent, would be any new combination of old material, constituting a new result or production in the form of a vendible article, not being machinery."

So, also, our own courts have said that: "A new process or method of operation is patentable, when it amounts to a successful application of known things; and the patent is *prima facie* evidence of novelty of the invention."

Roberts v. Dickey, 4 Brews., 260; 8 C., 8 Pittsb., 352; 1 Pat. Off. Gaz., 4; *Roberts v. Dickey*, 4 Fish. Pat. Cas., 532; *Detmold v. Reeves*, 5 Pa. Law Jour. Rep., 99.

Concede that Evans knew that there were different kinds of paper, each one of which possessed separately some one of the qualities which he was seeking to combine; still, if he was the first to combine material and processes which united those separate qualities in their product, such product was a new manufacture by reason of the new combination.

Many v. Sizer, 1 Fish., 17.

So, also, in *Goodyear v. R. R. Co.*, 3 Wall., Jr., 356, *Mr. Justice Grier*, in speaking of the soft vulcanized rubber, said: "It was a combination of matter having qualities possessed by no other known material."

Many v. Jagger, 1 Blatchf., 372, and *Muntz v. Foster*, 2 Web. Pat. Cas., 96, are illustrative of the same rule.

In *Ryan v. Goodwin*, 3 Sumn., 514, where the subject-matter of the patent was the chemical composition used upon the ends of matches to secure their ignition, *Judge Story* held that the omission, from the former composition, of one of the ingredients, viz: the chlorate of potash, was sufficient to sustain the patent.

Evans omitted all those substances and modes of treatment which produced the undesirable

NOTE.—Patents; what re-issue may cover. See note to *O'Reilly v. Morse*, 56 U. S. (15 How.), 62.

qualities of excessive stiffness, splitting, cracking and discoloration, and combined for the first time the qualities which render the product a successful one as a collar paper.

In *Strong v. Noble*, 6 Blatchf., 477, a patent for a whip-handle covered by a knit fabric was upheld, although the handle was old, and although tubular coverings and other kinds of coverings than those produced by knitting were old; and it was held that, because there were advantages resulting from the knitted fabric in point of ornament, economy and durability, which could have become known only by experiment, the combination was a new manufacture.

In *Hoffman v. Stiefel*, 7 Blatchf., 58, the court, speaking of paper collars with an enameled surface, said:

"The fact that such a collar was not known as a practical thing before the plaintiff made it, would naturally lead to the conclusion that the proper enameled paper was not made until the plaintiff made it. Because, if the paper had been known, the use of it for the collar was sufficiently obvious. Finding no proper enameled paper ready to his hand, the plaintiff experimented for some time to produce it and at length succeeded, and making the collar followed." If this was true of simply enameling the collar paper, which implied the use of a paper suitable for a collar, *a fortiori* it is true of a paper which, for the first time, supplied the market with a paper collar "as a practical thing."

It is said in *Curt. Pat.*, 57:

"It is not to be laid down broadly, that the use of one material in the place of another can never be the subject of a patent. If such substitution involves a new method of attachment or construction, or leads to any new mode of operation, or develops a new application of the properties in matter, so as to change the use of the manufacture or machine, there may be in the use of the new material a patentable invention."

This view was adopted, in its larger and more generous extent, in the case of *Goodyear D. V. Co. v. Smith*, 5 Pat. Off. Gaz., 585.

Messrs. J. J. Coombs and Edward Wetmore, for appellees:

Paper collars are folded, whether on a straight or on a curved line, by the same methods by which paper has been folded on such lines from time immemorial. The specification does not suggest any new methods nor any novelty or difficulty in applying the old methods.

The plaintiffs do not attempt to contradict or deny the fact that the collars in question were made and publicly used; but they claim that they were abandoned and fall within the rule of abortive experiments.

The rule, however, does not apply, for this reason: where an article has been once successfully made and also used in public, not necessarily used by the public (*Curt. Pat.*, 64, and cases cited), it is sufficient to destroy the claim of a subsequent alleged inventor of the same article.

The bare fact that the paper collars made before Gray's patent did not become articles of trade, or even that the attempt to introduce them as articles of trade proved unsuccessful, does not, of itself, prove that, these collars

were not completely and successfully made, and perfectly folded on a curved line by the means described. On the other hand, the evidence being direct and decisive that they were successful, and were actually and frequently worn and used in public, there is nothing in the facts mentioned which overcomes that evidence or avoids the conclusion that in the instances named, Gray's alleged invention was completely anticipated.

The rule governing the examination of re-issues by the courts, is now well settled. It is true, judicial tribunals cannot go behind the action of the Patent Office, on the mere questions whether errors had arisen from inadvertence, etc., as required by the statute, before the re-issue was granted. Whatever frauds may have been practiced in obtaining the corrected grant, they cannot be investigated in a suit for infringement.

Not so, however, the jurisdictional fact that the re-issue must be for the same invention as the original.

Am. Wood Paper Co. v. Disintegrating Co., 6 Blatchf., 27 [affirmed 90 U. S., ante, 35]; *Carlton v. Boker*, 17 Wall., 463 (84 U. S., XXI., 517).

In the present instance, it appears upon the face of the two specifications, that the alleged inventions described in the original and in the re-issue are not only different but repugnant.

Re-issues are allowed when a patent is inoperative or invalid by reason of a defective or insufficient specification, and a new and correct patent can be issued only for the same invention, as that defectively or insufficiently described in the original, not for a different invention or one not described at all in the original.

Evans was not the inventor of the thing described and claimed in that patent, whether what is so described and claimed is patentable or not.

He saw a sample of paper made by a particular maker, which was suitable for collars, except as to color and some minor details. He took this sample to the manufacturer and ordered a quantity of the same paper, with the requisite change as to color.

He was wholly ignorant of the art of paper making, and gave no directions or suggestions as to the mode in which the paper was to be manufactured, and had no other agency in producing the paper than ordering it in the first place, and pointing out to the paper maker afterwards, when the paper was not white enough or thick enough, etc., for the purpose for which it was to be applied.

The allegation of the plaintiffs is, that, in doing as above recited, Evans invented a new article of manufacture, by inventing the material from which it is made.

It must be admitted that the whole of the alleged invention consists in the paper. If Evans did not invent the paper, he did not invent anything.

Now, if there is nothing new in the process of making the paper, there can be nothing new in the paper when made.

There may be an old product from a new process, but there cannot be a new product from an old process. No article can be made or imagined, which is novel, which has some difference distinguishing it from other things of the

same kind, of which that novelty is not caused by some corresponding novelty in the process of its construction. If two things are made in exactly the same way, they must be actually similar. This is self-evident.

In the present instance, the paper claimed in the Woodbury re-issue, if it was new, must have owed that novelty to some corresponding change in the process of its manufacture.

If the Evans paper was a new thing, Evans must have invented the way of making it, or he is not entitled to a patent, either for the paper when made or the collar made from it. The Woodbury specification admits this by implication, by stating that "The invention of said Evans is not confined to any specific proportion of hard stock," etc., *i. e.*, his invention consists in using "hard stock," etc., but is not confined to any specific proportions, etc. Yet, according to the plaintiff's claim, Evans' part in the invention did not consist in any suggestion as to the way of making the paper, but simply in describing the general qualities it should possess when made. He merely stated the problem, without hinting at any method of its solution.

Whoever suggests the plan or principle of the invention, is the first and true inventor.

See, *Curt. Pat.*, sec. 19, *et seq.*, 3d ed.; *Allden v. Dewey*, 1 Story, 836; *Pitts v. Hall*, 2 Blatchf., 229; *King v. Arkwright*, 1 Web. Pat. Cas., 64; *Minter v. Wells*, *Idem.*, 132.

What, then, is the "plan or principle" of the alleged invention in the Woodbury re-issue?

The principle of an invention, in any case, consists of the method or rule of action embodied therein.

"Whoever discovers that a certain useful result will be produced in any art, machine, manufacture or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses, in a manner so full and exact that anyone skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. If this cannot be done by the means he describes, the patent is void; and if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more. And it makes no difference in this respect whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy known or unknown before his invention, or by machinery acting together upon mechanical principles. In either case he must describe the manner and process as above mentioned, and the end it accomplishes. And anyone may lawfully accomplish the same end without infringing the patent, if he uses means substantially different from these described."

O'Reilly v. Morse, 15 How., 62.

Mr. Justice Clifford delivered the opinion of the court:

Patents may be granted for a new manufacture, as well as for a new and useful art, machine or composition of matter, if it appears that the manufacture is both new and useful,

and that the applicant, who desires to obtain the exclusive property therein, is the original and first inventor or discoverer of the improvement. Such a patent, also, if inoperative or invalid for either of the reasons stated in the 13th section of the Patent Act may, if the error arose from inadvertence, accident or mistake, and without any fraudulent or deceptive intention, be surrendered; and in that event, the commissioner may cause a new patent to be issued for the same invention for the residue of the period then unexpired, for which the original patent was granted.

5 Stat. at L., 122.

Matters embraced in the pleadings not in controversy will be passed over without comment. Seven of the patents described in the bill of complaint are of that character which leaves but two for re-examination. Certain of the patents were adjudged invalid, in respect of which there is no assignment of error by the complainants; and certain other patents were adjudged valid, and the respondents not having appealed from the decree, the question of their validity is not open to re-examination.

Two other patents were surrendered by the complainants and re-issued during the litigation for the infringement, of which no profits or damages can be recovered in this suit. Stripped of all such matters, the case presents two principal questions for decision: 1. Whether the re-issued patent granted to Andrew A. Evans for improvements in paper shirt collars is a valid patent. 2. Whether the re-issued patent originally granted to Solomon S. Gray for improvements in turn-over shirt collars is a valid patent.

Usually the question of infringement also arises in such controversies, but that question is closed in this case in favor of complainants by the admission of the respondents.

Proofs were taken on both sides, and the circuit court entered a decree that the two patents in issue here are invalid, and the complainants appealed to this court. Since the appeal was entered here, the complainants have filed the following assignment of errors: 2. That the circuit court erred in its decision that Evans was not the inventor of his patented product, and in its decree that the re-issued patent therefor is not a valid patent. 3. That the circuit court erred in its decision that Gray's invention was anticipated by prior inventions, and in its decree that the re-issued patent therefor is not a valid patent.

Two answers are made to the first assignment of errors:

1. That the re-issued patent of Evans is not for the same invention as the original, which, if true, is sufficient to show that the patent is invalid, even if the patentee was the original and first inventor of the improvement described in the original patent.

Power to surrender patents for the purpose suggested in the Act of Congress implies that the specification may be corrected to the extent necessary to cure the defects and to supply the deficiencies to render the patent operative and valid, but the interpolation of new features, ingredients or devices which were neither described, suggested nor substantially indicated in the specification, drawings or Patent-Office model were never allowed, and by a recent Act

of Congress it is provided that no new matter shall be introduced into the specification, nor, in the case of a machine patent, shall the model or drawings be amended except each by the other. 16 Stat. at L., 206.

Repeated decisions also have established the rule that parol testimony is not admissible, in an application for a re-issued patent, to enlarge the scope and effect of the invention beyond what was described, suggested or substantially indicated in the original specification, drawings, or Patent-Office model, as the purpose of a surrender and re-issue is not to introduce new features, ingredients or devices, but to render effectual the actual invention for which the original patent should have been granted.

Unless, however, it is apparent upon the face of the new patent that the commissioner has exceeded his authority, his decision is final and conclusive, as the jurisdiction to re-issue patents is vested in him subject to a single exception: that if there is such repugnancy between the old and the new patent that it must be held, as matter of legal construction, that the re-issued patent is not for the same invention as that embraced and secured in the original patent, then the re-issued patent is invalid.

Whether a re-issued patent is for the same invention as the surrendered original or for a different one, must very largely be determined by a comparison of the two instruments, as the decision must necessarily depend upon the question whether the specifications and drawings of the re-issued patent are not substantially the same as those of the original; and if not, whether the omissions or additions are or are not greater than the law allows to cure the defects of the original specification.

Before describing the nature of his invention, the patentee in this case admits that he is aware that shirt collars have been made of a fabric composed of paper and woven cloth prepared in a peculiar manner, and that collars of an indifferent character have been made of the ordinary kinds of paper; but the former, as he states, are expensive and have a coarse appearance, and the latter are too fragile to admit of a suitable button hole, or to be of much utility as a shirt collar.

His invention, as he says, consists of two features: 1. In making shirt collars of a fabric known to the trade as parchment paper, or paper prepared with an animal sizing, which may be manufactured cheaper than a fabric composed of paper and cloth, and is sufficiently strong and tough to form tenacious button-holes, and is susceptible of a smoother surface and polish than cloth paper, and may be turned over without cracking or forming a roughened edge. 2. In coating one or both sides of paper shirt collars with a thin varnish of bleached shellac, which not only adds smoothness, strength and stiffness to the fabric, but, being a repellent of water, it also prevents perspiration or other moisture from entering the fabric of the collar, and renders the surface of the paper so hard and smooth that it wears much longer without being soiled by being exposed to dust or dampness.

Specific directions are then given by the patentee as to the manner of dressing the described fabric before it is manufactured into shirt collars, as follows: first, take the parchment paper or paper prepared with animal sizing, and cover

one or both sides of it with thin varnish of bleached shellac, and allow it to dry. Then pass the paper through the polishing rollers, such as are in general use for polishing paper or cloth, and then the fabric is ready to be cut into collars and the button holes may be punched by dies, with great rapidity.

Instead of that, the representation of the re-issued patent is, that the alleged inventor discovered, as the result of his experiments, that in order to produce a really good collar, the paper used for the fabric must possess sufficient strength, without excessive thickness, to destroy the resemblance to linen, and sufficient tenacity, toughness and pliability to allow the collar to be folded upon itself without cracking at the fold, with the pureness of color and necessary polish to resemble starched linen.

Shirt collars of the kind described, he made, as represented in the specification of the re-issued patent, out of a paper which he produced or caused to be produced, in which he combined those qualities; which paper was made of a long fiber substantially in that respect like bank-note paper, and of about the same thickness as an ordinary shirt collar and of a pure shade or color, such as to resemble starched linen. By means of the length of the fiber of the material, he was enabled, as the representation is, to obtain from the specified degree of thickness the requisite degree of strength, tenacity and pliability, to make a collar practically useful for wear, without interfering with the resemblance in appearance to a linen collar; and the representation is, that he found a sample of the paper which was suitable, and that he used it and filed it with his original application for a patent.

Particular description is also given of the means the inventor employs to produce paper possessing the requisite qualities for such a manufacture as follows: what is known as hard stock, it is said, must be used in larger proportion than is required for other descriptions of paper, except for that which is known as bank note paper, and in the process of pulping the stock, that dull knives should be used, and that the knives or beaters, and the mode of their striking the knife bar, should be so arranged as to draw out the pulp instead of chopping it short, constituting what is known as the long beating process, which should be continued for a great length of time, so that the fibers shall be not only long, but fine, the effect of which will be to make the paper stronger and smoother, and to bed the fiber in the thickness of the paper so as not to mar the surface.

Two modes of manufacturing the pulp stock into paper are then described, as follows:

1. If worked upon a cylinder machine, the representation is that the paper may be run off in two or more sheets of pulp, which may be united as they run from the machines, and pass together one over and the other under the press or rolls, into one sheet of the required thickness; or one sheet may be first run off upon a reel, and then united in the same manner with another sheet running from the cylinder, and both passing under the rolls together. Preference, however, is given by the patentee to the former mode, for the reason that the several sheets are in that case of equal degrees of moisture, and, therefore, form in that state a more perfect union; and, he adds, that great care must be

taken to expel the moisture from the pulp in case a single sheet is used in that mode of manufacture, as the thickness and length of fiber tend to retain the dampness.

2. Such paper, it is said, may also be made, of the required thickness, from a single sheet of pulp, in case a Fourdrinier machine is used; but the representation is, that the wire on which the pulp is formed should be supplied with extra suction boxes to remove the water, and that its forward motion should be much slower than in the manufacture of ordinary paper, but the lateral or vibratory motion of the wire should be even more rapid than usual, in order to afford greater time and motion for extracting the moisture from the pulp. Care should also be used to give to the paper in the pulp the slight bluish tinge which is found in starched linen, and to prevent its having a dead or yellowish white color.

Instruments so widely different can hardly be compared within the usual meaning and ordinary application of that word, as they really have substantially nothing in common, so far as respects the description of the invention which they respectively profess to secure. Examples where the difference between the original and re-issued patents is as manifest as in this case may perhaps arise; but none such were referred to in the argument of such a striking character, nor are any such within the recollection of the court where the difference between the re-issued and original patents is so pervading as in the case in decision.

Wide differences in that regard were exhibited in a case recently decided by this court, but they were by no means as striking and unmistakable as those disclosed in this record. *Gill v. Wells*, 6 Off. Gaz., 886 [*S. C.*, 89 U. S., XVII., 699]. Here the dissimilarity extends to every part of the description of the invention. There it had respect only to one of the elements of the patented combination.

Attempt was made in that case to emasculate the combination described in the original patent by leaving out one of the material elements in order to give the exclusive right a more comprehensive effect in prosecuting suits for infringement; but in the case before the court the re-issued patent is different throughout from the invention embodied in the original patent.

Proof of that proposition is found also in the respective claims of the patents as well as in the respective specifications. What I claim as new and desire to secure by letters patent, says the original patentee, is a shirt collar made of parchment paper and coated with varnish of bleached shellac; but the patentee of the re-issued patent claims as an article of new manufacture a collar made of long fiber paper without referring to a coating of any kind; nor is the question affected in the least by the fact that the claim of the respective patents concludes with the phrase, "substantially as described," because the description of what is claimed, as given in the respective specifications, is even more widely different than the claims of the respective patents.

Instead of the phrase employed in the claim of the original patent, the specification to which it refers states that the nature of the invention consists, first, in making shirt collars of a fabric known to the trade as parchment paper, or paper prepared with animal sizing; and, sec-

ond, in coating one or both sides of paper shirt collars with a thin varnish of bleached shellac, which, as there represented, not only adds smoothness, strength and stiffness to the fabric, but also, being a repellent of water, prevents perspiration or other moisture from entering the collar.

Nor will any attempt to construe the claim of the re-issued patent by the specification have any tendency to remove the difficulty in the way of the complainants, as the specification is to the same effect as the claim, and shows conclusively that the manufacture there described is a collar made of long fiber paper manufactured in the manner and by the means therein minutely described; that the paper there described is not the parchment paper described in the specification of the original patent, nor is it paper prepared with animal sizing, nor does the specification or claim of the re-issued patent contemplate or require that either side of the collars shall be coated with varnish of bleached shellac for any purpose. Animal sizing, according to that patent, may be used or it may be omitted, and one or both sides of the paper may be covered with a thin varnish of bleached shellac, or such a coating may be omitted altogether, which shows that those two requirements of the original patent are not a material part of the invention embodied in the re-issued patent.

Authorities to support the proposition that a re-issued patent is invalid if not for the same invention as the surrendered original are scarcely necessary, as the rule is universally acknowledged. *Gill v. Wells* [*supra*].

2. Suppose, however, the two may be so construed as to obviate that objection to the re-issued patent, still the second defense of the respondents remains to be considered, that the patentee in the original patent is not the original and first inventor of the alleged improvement.

Usually the patent when introduced is *prima facie* evidence to support the affirmative of that issue, but the representations of the specification may be such as to afford satisfactory proof that the alleged invention is neither new nor useful. Equivalent views were expressed by the circuit court in disposing of the question involved in the present issue, and in those views the court here entirely concurs. *Paper Collar Co. v. Van Deusen*, 10 Blatchf., 119.

Nothing was known to the supposed inventor respecting paper made of long fiber when he obtained his original patent, except that he previously found, as he states in his re-issued patent, a sample of it ready-made, suitable for such a purpose, and that he used it and filed it with his original application for a patent. Where he found it does not appear, nor does it appear for what purpose he used it, except that he filed it in the Patent Office. He does not even state that the original patentee knew who made it, nor that he had any knowledge of the process by which it was made. Viewed in any reasonable light the narration shows that the sample was made by another and not by the supposed inventor, and it affords a strong ground of presumption that he knew nothing respecting the process of manufacturing such paper, or of the constituents of the manufacture, except what is matter of common knowledge.

Hard stock, it is now said, must be used in larger proportions than is required for other descriptions of paper, and that the pulp must be subjected for a greater length of time to the long beating process, so that the fiber shall be not only long but fine, in order that the paper may be strong, smooth and even, and that the fiber shall become bedded in the thickness of the paper so as not to mar the surface. Neither of such requirements or conditions was contained in the original specification, from which it may be inferred that the original invention did not include the discovery of the constituents of the paper to be used for the purpose, nor the process by which the paper was to be manufactured. Conclusive support to that proposition is found in the specification of the original patent in which the patentee states that he takes the parchment-paper known to the trade, or paper prepared with animal sizing, and covers one or both sides of it with thin varnish of bleached shellac, and having allowed it to dry, the paper is then passed between polishing rollers, such as are in general use for polishing paper or cloth, which operation finishes the fabric ready to be made into collars.

Enough appears in these suggestions to show that the specification of the original patent does not describe the process of making paper possessing the qualities of long fiber paper, but the making of collars out of parchment-paper, showing that the discovery that for a good paper collar the manufacturer must have paper which possesses the qualities of long fiber paper is a subsequent discovery. Nor does the statement in the re-issued specification, that he produced such a paper or caused it to be produced, strengthen the case for the complainants, because the same specification states in effect that he found a sample of such paper suitable for the purpose, and that he used it and filed it with his original application, showing conclusively that the paper existed prior to his supposed invention.

Improvements in the manufacture of paper have often been made; and it may be that the discovery, at that period, of the constituents for making such paper or of the process by which paper possessing the described properties could be produced, would have been the proper subject of a patent. Sufficient appears to show that the patentee learned from his experiments that he wanted paper of the qualities described in the re-issued patent, and the evidence proves that he said so to the paper manufacturer; but it is clear that he did not communicate any information to the manufacturer respecting the process by which such paper could be produced, nor did he give the manufacturer any directions upon the subject. Information of the kind he could not communicate for the best possible reason; which is, that he was utterly destitute of any knowledge as to the constituents of such paper or the process by which it could be manufactured. Such paper was eventually produced by the manufacturer to whom the patentee applied to make the attempt, after many experiments as to the character of the materials suited to the end, and as to the mode of operation best adapted to effect the desired result, without any assistance whatever from the patentee.

Good paper collars may unquestionably be
See 23 WALL.

manufactured from that product, but it is nevertheless true that the patentee is not entitled to a patent for the collars as a new manufacture, for several reasons: (1) Because he did not invent either the product or the process by which the product is obtained. (2) Because the collars, apart from the paper of which they are made, are identical in form, structure and arrangement with collars previously made of linen, paper of different quality and other fabrics. (3) Because it appears that the patentee is not the original and first inventor either of the paper or of the process by which the paper is made, or of the collar which is denominated a new manufacture.

Articles of manufacture may be new in the commercial sense when they are not new in the sense of the patent law. New articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production. *Glue Co. v. Upton*, 6 Off. Gaz., 840.

Nothing short of invention or discovery will support a patent for a manufacture any more than for an art, machine or composition of matter, for which proposition there is abundant authority in the decisions of this court. *Hotchkiss v. Greenwood*, 11 How., 285; *Phillips v. Page*, 24 How., 167 [65 U. S., XVI., 640]; *Jones v. Morehead*, 1 Wall., 162 [68 U. S., XVII., 668]; *Stimpson v. Woodman*, 10 Wall., 121 [77 U. S., XIX., 868].

Suffice it to say, that it is not pretended that the original patentee invented either the paper or the process, but the claim in argument is that he was the first person to conceive the idea that paper possessing the described qualities was desirable for the purpose of making such collars; and that, inasmuch as he was not a paper manufacturer he had a right to employ trained skill to produce the desired product, and that he, under the circumstances, should be regarded as the actual inventor because he made known to the manufacturer that paper of such qualities would be useful, and because he employed the manufacturer to engage in the effort to produce the desired article; but the patentee communicated no information to the manufacturer as to the constituents or ingredients to be used, or as to the mode of operation by which they were to be compounded in order to produce the desired result.

Where a person has discovered a new and useful principle in a machine, manufacture or composition of matter, he may employ other persons to assist in carrying out that principle, and if they, in the course of experiments arising from that employment, make discoveries ancillary to the plain and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original principle, and they may be embodied in his patent as part of his invention.

Doubt upon that subject cannot be entertained; but persons employed, as much as employers, are entitled to their own independent inventions, and if the suggestions communicated constitute the whole substance of the improvement the rule is otherwise, and the patent, if

granted to the employer, is invalid, because the real invention or discovery belongs to the person who made the suggestions. *Agawam Co. v. Jordan*, 7 Wall., 602 [74 U. S., XIX., 181].

Apply that rule to the present case and it is clear that the original patentee was not entitled to a patent either for the paper or the process, as he never made any invention or discovery upon the subject.

Remark respecting the other patent granted to the same party is quite unnecessary, as it is admitted that it falls within the same rule as the preceding patent, and for the additional reason that the decision of the circuit court in that regard is not assigned for error.

8. Two principal defenses are set up by the respondents to the charge made against them, that they have infringed the re-issued patent of Solomon S. Gray, as set forth in the bill of complaint: (1) That the patentee is not the original and first inventor of the improvement. (2) That the alleged invention had been in open and public use and on sale in this country for more than two years, with the consent and allowance of the supposed inventor, before he filed his application for a patent.

Three claims are contained in the re-issued patent, substantially as follows: (1) The turning over of a paper or a paper and cloth collar by a defined line, whether pressed into the material by a die or pointed instrument, or by bending it over the edge of a pattern or block of the proper curve or line, substantially as described. (2) So turning the part B of a paper or paper and cloth collar over towards the part A, in a curved or angular line, instead of a straight line, substantially as and for the purpose described. (3) So turning the part B onto or towards the part A, in the manner described, as that a space shall be left between the two parts.

Which it is admitted is substantially the same as the second claim, in consequence of which those two claims will be considered together.

1. Collars of paper or paper and cloth, if turned over on a defined line, are covered by the first claim, whether the line is curved, angular or straight, and whether the line is made or pressed into the fabric by a die or any pointed instrument, or marked or effected by bending the material over the edge of a pattern or block of the proper or preferred line or curve. Evidently, therefore, it is intended to cover collars turned over on a defined line effected in any possible manner or by any practicable means, if made of paper or paper and cloth. Shirt collars are turned over or down on a curved line in order to prevent the collars from puckering or wrinkling when bent in a circle, and in order to cause the part turned over or down to set out a little from the band portion of the same, so as to admit a necktie between the band and the part of the collar which is turned over.

Manifestly these objects are precisely the same whether the collar be all paper, paper and cloth, or all linen. Hence it is difficult to perceive upon what ground it can be held that any change in the manner of turning down a collar on a curved line, if made of any one of these fabrics, is patentable, if collars of either of the other fabrics have been turned down before in the same manner and precisely for the same purpose.

Evidence is exhibited which shows that, many

years before the patent was granted in this case, paper envelopes and the tops and bottoms of paper boxes were produced by shapers of steel pressed on the material so as to produce defined lines by which the material could be folded. Satisfactory proof is also exhibited that collars made of paper and cloth were, several years earlier than the date of this invention, folded over a piece of metal in a straight line, which is the same process as that described in the specification of this patent, as it appears that the material was bent over a pattern or block to give the proposed curve or line.

Plenary evidence is also exhibited showing that linen collars were ironed on blocks with a groove in the block by which the collar received a defined line for the folding, which accomplished the same purpose as the pattern or block.

Proofs were also exhibited showing that paper collars, long before the alleged invention under consideration, were folded by laying upon the unfinished side of the same a piece of tin having at one edge the required curve, which enabled the manipulator to accomplish the same object by pressing upward over such curve a part of the collar so as to mark the line of the curve and crease the paper preparatory to turning the collar over, which enabled the laundress to accomplish the same object as the means described in the specification of the patent.

Support to the answer is also derived from the proofs that linen collars had for years been turned over in a curved line and for the very purpose described, which is to prevent wrinkling and to afford space for the cravat.

Taken as a whole, the proofs in this regard are conclusive, that the patentee is not the original and first inventor of the patented improvement described in either of the claims of his patent.

Decree affirmed.

Cited—94 U. S., 197; 95 U. S., 218.

GEORGE TREAT ET AL., *Plffs. in Err.*,

v.

SAMUEL JEMISON.

Rehearing, when denied.

A motion to set aside a judgment of affirmance of this court, and for a rehearing, will not be granted, although such judgment was rendered for a default in practice, which is excused, if it clearly appears that, on a rehearing, the judgment must be affirmed on the merits.

[No. 721.]

Motion filed Mar. 22, 1875. Decided Apr. 5, 1875.

IN ERROR to the Circuit Court of the United States for the District of California.

On motion to set aside judgment of affirmance and for leave to file new brief, etc.

See, 87 U. S., XXII., 449, for the decision in this case, to set aside which, this motion is made. The question raised by the case is, as to the admissibility of evidence, which the court did not deem it "necessary to discuss in an opinion." Although the judgment of affirmance was made nominally for irregularities and defects of the briefs, regard was, nevertheless, paid to their substance; consequently this motion was denied although reasons were presented sufficient to excuse the defects of the first brief and to allow

an amendment if the case had really been decided upon such defects.

Mr. M. Blair, in support of the motion.

Mr. Chief Justice Waite delivered the opinion of the court:

Before affirming the judgment presented by this record, we carefully examined the arguments submitted by counsel, although not in conformity with Rule 21, and considered the case upon its merits. Being entirely satisfied that the judgment of the court below ought to be affirmed, and not deeming it necessary to discuss in an opinion the several questions presented for our determination, we availed ourselves of the opportunity to call the attention of the Bar specially to the new Rule as to the form of briefs, which, if adhered to, will, we think, be of great service to counsel as well as the court.

The reasons assigned for setting aside the judgment of affirmance and for leave to file a new brief, are such as would certainly have induced us to grant the motion, if it were necessary for a correct decision of the case. The questions involved were all fairly and ably presented by the arguments submitted on both sides. Since this motion we have again examined the case, and are confirmed in our original opinion.

For the reason, therefore, that the judgment must be affirmed if a further hearing is granted, this motion to set aside the order of affirmance already entered, is denied.

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BENJAMIN R. THOMAS ET AL., Appts.,

v.

EDMUND WOOLDRIDGE ET AL.

(See S. C., 23 Wall., 283-289.)

Motion to dismiss, when heard—insufficient notice—parties to motion—final decree.

not lie from an interlocutory decree dissolving an injunction.

Young v. Grundy, 6 Cranch, 51.

Or refusing an injunction.

Gibbons v. Ogden, 6 Wheat., 448; *U. S. v. Clarke*, 9 Pet., 187; *McCollum v. Bager*, 2 How., 61; *Verden v. Coleman*, 18 How., 86 (59 U. S., XV., 272); *Forney v. Conrad*, 6 How., 204; *Perkins v. Fourniquet*, 6 How., 206; *Boebe v. Russell*, 19 How., 283 (60 U. S., XV., 668); *Thompson v. Dean*, 7 Wall., 342 (74 U. S., XIX., 94); *Moses v. The Mayor*, 15 Wall., 387 (82 U. S., XXI., 176); *St. Clair Co. v. Livingston*, 18 Wall., 628 (85 U. S., XXI., 813); *Moore v. Robbins*, 18 Wall., 588 (85 U. S., XXI., 758).

These authorities show, in a very clear and satisfactory light, the propositions we seek to maintain:

1. That the power of this court has attached, the appeal having been perfected, and the record in its possession.

2. That the record shows clearly that there was no final decree, which ends the case, rendered in the court below and, therefore, there is no jurisdiction in this court.

3. That the appeal, being ineffectual on its face to have the case reviewed in this court, it should be dismissed, so that the cause shall be proceeded with in the court below, to final trial and decree.

Mr. A. B. Pitman, for appellants:

Where injunction is the sole equity of the bill and the only relief sought, an order of dissolution is such a final order as can be appealed from.

High. Injunc., sec. 892; *Titus v. Mabes*, 25 Ill., 287.

And this court has indicated a similar view of the law.

Thompson v. Dean, 7 Wall., 342 (74 U. S., XIX., 94); *R. R. Co. v. Bradley*, 7 Wall., 575 (74 U. S., XIX., 274); *Stoval v. Banks*, 10 Wall., 583 (77 U. S., XIX., 1038).

Mr. Chief Justice Waite delivered the opinion of the court:

The bill in this case was filed to enjoin the collection of a judgment rendered in the Circuit Court of the United States for the Southern District of Mississippi, in favor of Edmund Wooldridge against the present complainants, until such time as the complainants should be discharged from their liability as garnishees in certain attachment suits commenced in the Circuit Court of the State against Wooldridge. The bill also prayed that if the complainants should be adjudged to pay the judgment debt under such garnishment proceedings, Wooldridge might be perpetually enjoined from its collection.

Upon the filing of the bill an interlocutory injunction was allowed. An answer and replication thereto were afterwards filed, and testimony taken. On the first December, 1874, Wooldridge moved to dissolve the injunction upon bill and answer filed, and on the same day the following order was made in the cause.

"This cause coming on to be heard upon the bill and answer filed and the motion of the defendant to dissolve the injunction heretofore granted herein, and after hearing the argument of counsel and being fully advised of and concerning the matters and things in the pleadings

mentioned, the court doth order, adjudge and decree that the said injunction be, and is hereby dissolved, and that the complainants pay the costs of this proceeding."

Upon the petition of the complainants, an appeal from this order was allowed on the 28th December, 1874. "To supersede the order of dissolution and re-instate the injunction." Bond was filed on the same day, to perfect the appeal.

This appeal having been allowed during the present Term of this court, the appellants had until the next Term to file the record here. Not waiting for the appellants to file the record, the appellees caused it to be done on the 9th February, 1875, and on the same day filed this motion to dismiss the appeal on the ground that the order appealed from was not a final decree. On the 25th February, the appellants were served at Vicksburg, Miss., with notice for the hearing of the motion on the 22d of March, but the notice was not accompanied by a copy of the brief or argument to be submitted. The record has been printed.

It is first objected that this motion cannot be entertained now because the appellants had until the next Term to file the record. In *Ex parte Russell*, 18 Wall., 671 [80 U. S., XX., 635], we decided that "Unless some unforeseen inconvenience should arise from the practice, we would not refuse to hear a motion to dismiss before the term in which, in regular order, the record ought to be returned," if the record was actually brought here and printed. We think now, as we did then, that such a practice will "be likely to prevent great delays and expense and further the ends of justice."

It is next objected that the notice of the motion is insufficient, because it was not accompanied by a copy of the brief or argument to be used in its support, as required by the amendment to Rule 6, adopted at the December Term, 1871. This might have been a good cause for postponing the hearing to give time for further preparation, if application therefor had been made. Instead of that, a full argument has been filed upon the merits of the motion. No more could be done if the hearing should be now postponed. Under these circumstances we are inclined to treat the filing of the argument as a waiver of the notice required by the rule.

It is next objected that all the parties defendant in the lower court are not parties to this motion to dismiss. The motion is made by the appellees, and is signed by the attorney of the only defendant in the court below who had any real interest in the litigation, and the only one who filed an answer.

This brings us to the merits of the motion. We have many times decided that an appeal will not lie from a decree dissolving an injunction without dismissing the bill. *Young v. Grundy*, 6 Cranch, 51; *McCollum v. Eager*, 2 How., 61; *Hiriart v. Ballon*, 9 Pet., 167; *Moses v. The Mayor*, 15 Wall., 390 [82 U. S., XXI., 176].

In this case the bill was not dismissed. It may have been the intention of the court to dispose of the whole case by the entry as made, but that intention is certainly not expressed. A motion was made to dissolve the injunction upon the bill and answer filed. It does not appear that the case was heard except upon this

motion, and there is nothing in the record to show that it will not be still within the power of the circuit court upon the dismissal of the appeal to grant the complainants all the relief they ask. The case is still open on its merits. It is only the interlocutory order that has been disposed of.

The appeal is dismissed.

Cited—94 U. S., 493.

THE NORTH CAROLINA RAILROAD COMPANY ET AL., Appls.,

v.

ANTHONY H. SWASEY ET AL.

(See S. C., 23 Wall., 405-411.)

Decree of foreclosure, when final—when not.

1. An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled, and nothing remains to be done by the court but to make the sale and pay out the proceeds.

2. But where the amount of the debt which the debtor must pay, in order to stop the sale, and what amount of property shall be sold if the debt is not paid, has not been determined, the decree is interlocutory and not final, and an appeal therefrom to this court cannot be taken.

[No. 637.]

Submitted Mar. 1, 1875. Decided Apr. 12, 1875.

APPEAL from the Circuit Court of the United States for the Eastern District of North Carolina.

On motion to dismiss.

The case is stated by the court.

Messrs. *Walter J. Budd*, *C. McDonald*, *S. P. Phillips* and *F. Carroll Brewster*, for appellees:

The decree in question is interlocutory, and not final.

McCollum v. Eager, 2 How., 61; *Brown v. Bk.*, 4 How., 465; *Mayberry v. Thompson*, 5 How., 121; *Barnard v. Gibson*, 7 How., 650; *Ayres v. Carver*, 17 How., 595 (58 U. S., XV., 180); *Craighead v. Wilson*, 18 How., 199 (59 U. S., XV., 332); *Beebe v. Russell*, 19 How., 284 (60 U. S., XV., 668); *Farrelly v. Woodfolk*, 19 How., 288 (60 U. S., XV., 670); *U. S. v. Finsatt*, 21 How., 445 (62 U. S., XVI., 186); *Blakey v. Fish*, Hemp., 11; *Young v. Grundy*, 6 Cranch, 51; *Barton v. Forsyth*, 5 Wall., 190 (72 U. S., XVIII., 545); *Houston v. Moore*, 3 Wheat., 433; *Gibbons v. Ogden*, 6 Wheat., 443; *Winn v. Jackson*, 12 Wheat., 135.

Messrs. *W. H. Battle* and *W. H. Smith*, for appellant:

This court said, in *Bronson v. R. R. Co.*, 2 Black, 531 (67 U. S., XVII., 360), speaking of the case then before it:

"This decree is not final in the strict technical sense of the word, for something yet remains for the court below to do. But, as was said by Chief Justice Taney in *Forgay v. Conrad*, 6 How., 203, this court has not, therefore, understood the words, "final decree," in this strict and technical sense, but has given them a more liberal and, as we think, a more reasonable

NOTE.—What is "final decree" or judgment of state or other court from which appeal lies. See note to *Gibbons v. Ogden*, 19 U. S. (6 Wheat.), 443.

construction, and one more consonant with the intention of the Legislature.

To the same effect, *Ray v. Law*, 8 Cranch, 179; *Whiting v. Bank of U. S.*, 13 Pet., 11; *The Palmyra*, 10 Wheat., 503; *Canal Co. v. Beers*, 1 Black, 54 (66 U. S., XVII., 41).

Mr. Chief Justice Waite delivered the opinion of the court:

The decree of the circuit court from which this appeal was taken is as follows:

"This cause coming on for further order, the court doth declare:

I. That, by the terms of the charter of the North Carolina Railroad Company, and the amendments thereto, the shares of stock in said Company belonging to the State of North Carolina, meaning thereby the shares and all dividends thereon, are pledged as security for the payment of the certificates of debt in such charter and amendments provided for, and for every part of such certificates, meaning thereby the interest accruing upon the principal thereof, as well as the principal.

II. That the plaintiff and those he represents as owner of such certificates of debt or bonds or of coupons detached therefrom, now hold large amounts of past due coupons of said certificates of debt or bonds, and that they are entitled to have their respective proportions of the stock or so much thereof as may be necessary sold in order to pay such past due interest.

Upon motion of counsel for the plaintiffs, it is therefore ordered and decreed that Joseph B. Bacheler, the Commissioner heretofore appointed in this suit, take an account of such unpaid interest, and of such further interest as will be due on or before the first day of April, one thousand eight hundred and seventy-five, and also of such proportion of the said stock of the State of North Carolina, in said North Carolina Railroad Company, as may be equitably applicable to the payment of said interest found due to each of the said plaintiffs respectively, and that he make report to the next Term of this court.

It is further ordered and decreed, that, unless on or before the first day of April, 1875, it shall be made to appear to this court that the said State of North Carolina has levied a tax sufficient to pay the said arrears of interest and has provided for its collection, or shall otherwise have paid or secured the payment of said past due interest, then so much of the said stock of the State in the said North Carolina Railroad Company apportioned to the plaintiff and those he represents as may be necessary to pay off and discharge said arrears of interest, shall be sold to the highest bidder for cash."

Directions are then given as to the manner in which the sale is to be made, and at the end of all are these words: "And this cause is held for further directions."

A motion is now made to dismiss the appeal, because this decree is not final.

An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds. This has long been settled. *Ray v. Law*, 8 Cranch, 179; *Whiting v. Bk. U. S.*, 13 Pet., 15. The sale in such a

case is the execution of the decree. By means of it the rights of the parties, as settled, are enforced.

But to justify such a sale, without consent, the amount due upon the debt must be determined and the property to be sold ascertained and defined. Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the court. A reference to a master to ascertain and report the facts is not sufficient. A master's report settles no rights. Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties.

With these well settled principles as our guide, it is easy to see that the decree here appealed from is not final. The amount of the debt which the State must pay in order to stop the sale has not been determined; neither has it been determined what amount of stock may be sold if the debt is not paid. In each of these questions the State has a direct interest, and through its representatives in court has the right to be heard. They must be settled before the litigation can be said to be at an end.

The amount of the debt and the proportion of stock applicable to its payment are, therefore, still open for future adjudication between the parties. Thus far the court has done no more than declare that, for the security of the payment of so much as is due, the plaintiff and those he represents have a lien upon their equitable proportion of the stock, and that the lien may be enforced by sale, if payment of the debt is not made. It has also declared its determination to order a sale, if payment of the debt is not made or satisfactorily provided for by April 1, 1875. In order that proper action may be had when this time arrives, the master has been directed to state the account of the indebtedness to the plaintiff and those he represents, and of their proportion of securities pledged by the State. In this, as it seems to us, the court has acted upon the suggestion in *Forgay v. Conrad*, 6 How., 201, and by an interlocutory order announced the opinion it had formed as to the rights of the parties and the principles of the decree it would finally render, leaving the entry of the final decree in form to be made when the amount due has been ascertained and an apportionment of the stock made. In this way the rights of all parties can be protected and no injustice done.

In this connection it may not be improper to call the attention of the circuit courts to what was said by Chief Justice Taney in *Forgay v. Conrad*, as to the care which ought to be exercised in the preparation of decrees of this character. Much time of this court and expense of litigants will be saved if more attention is given to the form of decrees when entered.

The appeal is dismissed.

Cited—106 U. S., 4, 71, 431.

JOHN D. COSBY, SHERIFF, etc., Admr. of JOHN ALLEN, Deceased; A. E. T. CAMPBELL, in her own right and as Admr. of ADAM HICKMAN, Deceased; DANIEL TRIGG, Trustee of WILLIAM KING HEISKELL, WINDHAM ROBERTSON, SARAH BALFOURS, WILLIAM ALLEN, DAVID M. HUNTER AND MARGARET, HIS WIFE, Appts.,

v.

MATTHEW H. BUCHANAN, late SHERIFF, etc., and Admr. de bonis non, with the will annexed of JOHN VINT, Deceased.

(See S. C., "*Crosby v. Buchanan*," 23 Wall., 420-458.)

Final decree, what is—insufficient objection—fraud—refusal to answer—laches—concealment, when evidence of fraud—partners in fraud.

1. Appeals will lie, when nothing remains to be done except to enforce the decree of the court below; but until all the rights of the parties have been finally passed upon and settled, the decree is not final and an appeal from it will not lie.

2. The objection, that a court of equity has no jurisdiction of the case, raised here for the first time, in a suit commenced thirty-six years ago, will not be considered.

3. In a court of conscience, deliberate concealment is equivalent to deliberate falsehood.

4. The absolute refusal of one to disclose the facts in his answer when directly called upon to do so, although the law does not compel him to disclose them, raises presumptions against him.

5. Where one rests his case upon the acknowledgment of payment expressed in his deeds, he must take the chances of being overcome by other facts and circumstances which repel the presumption arising from such evidence.

6. A party who slept upon his rights for a quarter of a century, and waited for every actor in the premises except himself to die, and who, in all the litigation affecting his interests never appeared so long as there was one alive who could speak against him from actual knowledge of the facts, and during all that time permitted his adversaries to assume and represent his title, cannot be regarded as the real owner.

7. Where one comes into court and asserts his absolute title as against ignorant heirs of deceased contracting parties, and willfully conceals his contract for a reconveyance and the receipt which belonged to it, he comes with unclean hands and must suffer the consequences. Such concealment is indicative of fraud.

8. Partners in fraud cannot claim a preference over each other on account of honesty of purpose or fairness in dealing.

[No. 162.]

Argued Jan. 29, Feb. 1, 1875. Decided Apr. 12, 1875.

A PPEAL from the Circuit Court of the United States for the Western District of Virginia. The case is stated by the court.

Messrs. John W. Johnston, J. A. Campbell and John A. Meredith, for appellants:

Vint has been guilty of gross laches and inexcusable delay in asserting his claim.

NOTE.—Length of time no bar to a trust. See note *Prevost v. Gratz*, 19 U. S. (6 Wheat.), 481.

Title to lands taken as security for moneys loaned is simply a mortgage, though the agreement is by parol. Absolute conveyance can always be proved by parol to be a mortgage. Where a person takes title at a judicial sale, for another, he is a trustee. See note to *Hughes v. Edwards*, 22 U. S. (9 Wheat.), 489; and note to *Colson v. Thompson*, 15 U. S. (2 Wheat.), 338.

What is "final decree" or judgment of state or other court from which appeal lies. See note to *Gibbons v. Ogden*, 19 U. S. (6 Wheat.), 448.

He was barred by lapse of time, and his bill should have been dismissed for these reasons.

"Nothing," says an eminent judge, "can entitle a plaintiff to relief in equity save conscience, good faith and diligence. When these are wanting a court is passive and does nothing." Vint cannot claim to have been diligent. But I insist that he was not only not diligent, but that the delay was intentional; he wanted to wait until John and Hannah Allen were both dead; until time had obliterated, as he thought, all evidence of his fraud, and he could stand upon his deed, which he hoped could not, after so many years had passed, be successfully attacked.

See, *Story, Eq., sec. 1520, and n.*; 2 *Tucker, Com.*, 406, ed. 1831; 1 *Mad.*, 79; *Coleman v. Lyns*, 4 *Rand.*, 454; *Phillips v. Prevost*, 4 *Johns. Ch.*, 205; *Moore v. White*, 6 *Johns. Ch.*, 368; *Gravenor v. Hallum*, *Amb.*, 645; *Todd v. Moore*, 1 *Leigh.*, 457; *Minor v. Wicksteed*, 3 *Brown, C. C.*, 629; *Lacon v. Briggs*, 3 *Atk.*, 107; *Hercy v. Dinwoody*, 4 *Brown, C. C.*, 257; *Story, Eq. Pl.*, ed. 1844, sec. 813 (3) and notes 1, 2; *Piatt v. Vattier*, 9 *Pet.*, 414; *Richardson v. Baker*, 5 *Call*, 516; *Baring v. Nash*, 1 *Ves. & B.*, 557.

The presumption against a plaintiff on account of lapse of time must be taken more strongly against one who stands badly in court, as Vint does.

If the objection appear on the face of the bill, it need not be made by either plea or answer.

Story, Eq. Pl., ed. 1844, sec. 503, and authorities cited in n. 1; *Straughan v. Wright*, 4 *Rand.*, 493.

The deed from Allen and wife to Vint was made Nov. 16, 1810, and recites a paid consideration of \$18,901.27; and that the deed from Samuel King to Vint was made Jan. 1, 1811.

In the brief period of six weeks elapsing between these two events, how did Allen become so largely in debt to Vint that \$10,000 would be only a credit?

It is impossible to resist the conclusion that Vint and Allen formed and attempted to execute a conspiracy to defraud Samuel King and Mrs. Allen, to get the estates of both, and divide among themselves.

Messrs. H. H. Wells and L. H. Chandler, for appellees:

The decree of Sep. 24, 1853, was a final decree because it decided the right of property in contest, holding that the deed from Allen and wife to Vint dated Nov. 16, 1810, was valid; that the deed from King and wife to Vint, dated Jan. 1, 1811, was void, and denied the prayer of the cross-bills for specific performance of the contract between Allen and Vint, dated Apr. 6, 1812. The complainant was entitled to have that decree immediately carried into effect.

No appeal having been taken from that decree for nineteen years, this court has now no jurisdiction to review the same. It falls within the decisions of this court in *Thompson v. Dean*, 7 *Wall.*, 342 (74 U. S., XIX., 94); *R. R. Co. v. Bradleys*, 7 *Wall.*, 575 (74 U. S., XIX., 274); *Storck v. Banks*, 10 *Wall.*, 583 (77 U. S., XIX., 1036).

In this case there was no unreasonable delay or unexpected laches.

Until the determination of the question, whether Samuel King and Hannah Allen took any estate under the will of their brother, Will-

iam King, there was no necessity, nor any propriety, in his instituting a suit to recover the property.

As to that portion of the property of greatest value, the salt-works so-called, Vint did not institute his suit, because it was still subject to an undetermined life estate in Mrs. Smith, the widow of William King. Her estate was not terminated until after the commencement of this suit; but before the termination of the ejectment suit, to wit: in 1825, a suit was instituted on the equity side of the district court, for a partition of this property.

The deed from Allen and wife to Vint, dated Nov. 16, 1810, was not void nor voidable, for either fraud or want of consideration.

Actual fraud is not to be presumed, but ought to be proved by the person who alleges it.

Garrow v. Davis, 15 How., 272; *Hager v. Thomson*, 1 Black, 80 (66 U. S., XVII., 41); *Clarks v. White*, 12 Pet., 178; *Gregg v. Sayre*, 8 Pet., 244.

It may be conceded that the real consideration was not in fact \$18,901.27, but that it was the sum of \$10,000, although it is incompetent to prove by parol a different consideration from that stated in the deed.

"It is a familiar law, which was applied in *Carter v. Jackson*, 4 Pet., 86, 88, that a mere recital of a fact in a deed is as effectual an estoppel as a covenant. * * * This is apparent when we remember that estoppels bind, not only parties but privies in blood and estate, though not personally liable on the covenant's creating the estoppel."

Bush v. Person, 18 How., 85 (59 U. S., XV., 274).

Inadequacy must be so gross as to shock the conscience, and amount in itself to decisive evidence of fraud before a sale can for that cause be set aside.

1 Story, Eq., 244, 246, and cases cited.

There was no error in the decree of the court refusing a specific performance of the contract of Apr. 6, 1812.

A party, unless he has shown himself prompt and desirous to perform, cannot call for specific performance.

McCue v. Ralston, 9 Gratt., 450; *Sugd. Vend.*, 360.

The complainant must show that he has performed or offered to perform, on his part, the acts which form the consideration of the defendant's undertaking.

Colson v. Thompson, 2 Wheat., 386; *Denniston v. Coquillard*, 5 McLean, 258; *Dorsey v. Puckwood*, 12 How., 126; *Bowles v. Woodson*, 6 Gratt., 78.

Mr. Chief Justice Waite delivered the opinion of the court:

On the 3d of March, 1806, William King, of Abingdon, Virginia, made his will by which, in case he died having no children, he devised all his real estate at the death of his wife to William King, son of his brother James King, on condition of his marrying a daughter of William Trigg and Rachel, his wife, in trust for the eldest son or issue of said marriage; or in case such marriage did not take place, then to any child of said William and Rachel Trigg that would marry a child of said James King or of Elizabeth Mitchell.

See 23 WALL.

He died without children, October 13, 1808, leaving a large estate, in the most of which his widow had, by the terms of the will, a life interest. He left as his heirs at law, one brother, James King, and two sisters, Nancy Findlay and Elizabeth Mitchell of the whole blood, and one brother, Samuel King, and one sister, Hannah Allen, the wife of John Allen, of the half blood. The events upon which the devise of the property on the death of his wife was to depend, never happened.

It was held by this court at its January Term, A. D., 1830, in the case of *Finlay v. King*, 8 Pet., 346, that the whole estate was devised to William King, the son of James King, subject to the life estate of the widow, but as it belonged to a court of chancery to determine whether he took the estate to his own use or in trust for the heirs of the testator, that question was left undecided. Accordingly, in September, 1830, a bill in chancery was filed to test that question, and at the January Term, A. D. 1834, of this court it was decided that he did take in trust for the heirs. *King v. Mitchell*, 8 Pet., 326.

In January, A. D. 1825, during the pendency of the litigation in some of its forms, a bill was filed in the Circuit Court of the United States by some of the heirs, to obtain a partition of the lands not incumbered by the widow's life estate, and on the 25th of April, 1836, after the last of the decisions in this court, an order was entered appointing Commissioners to make this partition. These Commissioners afterwards made a report, and among other things assigned to the children and heirs of Samuel King, and the children and heirs of Hannah Allen, one fourth the property divided, that being their share.

On the 24th of September, 1838, John Vint, the original complainant in this suit, filed the original bill against the heirs of Samuel King and the heirs of Allen and wife, in which he set forth substantially the facts above stated, and then alleged that he was the owner in fee of their interest in the estate. He stated that his title to the Allen interest and one fifth of the King interest, was obtained by a deed from Allen and wife, dated November 16, 1810, in which, for the consideration of \$18,901.27, they conveyed the same to him, and that his title to four fifths of the King interest was by deed from King and wife, dated January 1, 1811, in consideration of \$10,000, executed and recorded in Kentucky. He then stated that he did not desire a suspension of the proceedings in partition any further than was necessary to protect his rights, and that he was willing to accept the lands set off to the heirs as and for his share. The prayer of the bill was to the effect that he might be substituted for these heirs in the partition proceeding and that whatever was assigned to them might be adjudged to him.

In September, 1830, all the defendants answered the bill and, in substance, stated that they were very young when the transactions referred to occurred, and that they had no personal knowledge as to the matters in controversy. They denied generally all the allegations in the bill adverse to their interests, and suggesting many serious grounds of suspicion against the validity of the claim of Vint, demanded from him full and express proof of all the material averments of his bill, and es-

pecially for proof of due execution of the deeds and of their fairness, and of the full payment of the consideration thereof, and of the circumstances of the execution of the deeds and the alleged payments. The death of the widow of William King, the senior, was also suggested, and the heirs of Samuel King stated that they had conveyed their interest to Alexander Findlay.

On the 19th of September, 1839, Vint filed his supplemental bill, making Findlay a party, and also alleging the death of the widow and asserting his right to the interest of Samuel King and Hannah and John Allen in the property devised to her for life, and assigned to her for dower. In this supplemental bill he stated as follows:

"Your orator cannot suppose that it will be necessary for him to allege or prove the payment of the consideration acknowledged in solemn form by the parties to said deeds, until the fairness of the transaction and fullness of consideration are impugned by proof; but your orator asserts the payment of a full and fair consideration for their interests, which were then wholly contingent. Indeed, your orator was reduced from affluence to poverty by this very consideration paid for said interests. The deed from Allen and wife was duly admitted to record in the Circuit Court for Washington County, Virginia, on the 7th day of May, 1812, and the deed from Samuel King was duly admitted to record in the County Court of Pulaski County, Kentucky, where said Samuel King resided, on the 9th day of January, 1811; and on the 25th day of September, 1837, upon proof of the genuineness of said King's signature, the said deed was admitted to record in the County Court of Washington County, Virginia. * * * Your orator did not deem it necessary to prosecute his claim by suits until the suits should be determined in which the question was made, whether William King, son of James King, took under the will of William King as devisee of his real estate, or whether it descended and passed to his heirs at law. It was, moreover, useless and would have been premature to have asserted your orator's claim in the salt-works and dower property, until the life estate should be determined. Your orator is advised that he has been guilty of no laches from lapse of time, since he is in full time for partition, which has not yet been made, of any part of the estate."

To this supplemental bill Findlay answered, setting up his title under the conveyance from the heirs of Samuel King, and insisting upon several defenses not now material.

After the filing of the supplemental bill much testimony was taken. On the 7th of February, 1840, Francis Smith, who married the widow of William King, the elder, gave his deposition and in it furnished a copy of a contract as follows:

"This agreement entered into this 6th day of April, in the year of our Lord one thousand eight hundred and twelve, between John Allen, of the County of Washington in the State of Virginia of the one part, and John Vint, of the City of Washington in the District of Columbia, of the other part, witness: that the said John Vint, for and in consideration of the sum of \$14,450.63, to be paid by the said John Allen in the manner hereinafter mentioned, the said John

Vint doth covenant and agree to transfer, make over and convey to the children which the said John Allen now has, and to such other children as he may have with his present wife, Hannah, one half of all the interest which he, the said John Vint, may have in the estate of William King, deceased, by a conveyance from John Allen and Hannah, his wife, bearing date the 16th of Nov. 1810, and also by another conveyance from Samuel King and his wife, bearing date the first day of January, 1811, reference thereto being had, will more fully appear. It is further agreed that the said John Allen and the said John Vint shall contribute equal proportions of the expenses which may necessarily be incurred in the prosecutions of suits for the recovery of the estate aforesaid; but until the payment by the said John Allen to the said John Vint, of the sum of \$14,450.63, the said John Vint shall not be compelled to convey one moiety of his interest in the estate aforesaid to the children of the said John Allen by his present wife, Hannah; and should the said John Allen fail to make the payment to the said John Vint, of the sum aforesaid for and during the term of five years from this date, then and in that case it is further agreed between the parties, that this agreement shall be void and of no more effect than if it had not been entered into. Whereunto we have set our hands and fixed our seals the day and year above specified in the presence of,

M. SHUGART, JOHN ALLEN, (Seal.)
MICHAEL MONTGOMERY, JOHN VINT, (Seal.)
DAVID STOUT."

And afterwards a receipt as follows was discovered:

"Received of John Allen the sum of \$11,600, it being in part pay of a contract entered into, it bearing date the 6th day of April, 1812, it being on account of the estate of the deceased William King; it being for the benefit of the said Allen's heirs, the 7th April, 1812.
\$11,600. JOHN VINT."

Other testimony was from time to time taken in the cause, and finally, in December, 1842, the heirs of Hannah and John Allen filed their cross-bill, in which they stated that since the filing of their answers they had learned other facts most material in their character, and having an important bearing upon their rights and interests. They averred that these facts, "Though necessarily well known to complainant (Vint), since he was an actor and is the only surviving actor in the transaction, he has thought fit, from motives which cannot easily be misunderstood, to suppress." After referring to their extreme youth at the time the transactions occurred, and other circumstances likely to prevent their becoming acquainted with the facts, they set forth the foregoing contract and receipt, which had then recently been discovered in their search after the truth of the case. They then charged that the failure of Vint to bring these matters to the knowledge of the court was such a fraud on them as must deprive him of the aid of a court of conscience in the premises, and claim that under the circumstances of this case the payment of the balance of the purchase money due upon the contract should be presumed. They prayed, 1. For a cancellation of the deed from Allen and wife to Vint; or, 2. If that could

not be granted, a specific performance of the contract; or 3. A return of the purchase money shown by the receipt to have been paid.

To this cross-bill Vint answered in Sep., 1843, denying all charges of fraud and improper suppression of truth, and then saying that "He fairly purchased and paid for the interest of John Allen and Hannah, his wife, and of Samuel King in the estate of William King, deceased, and, by deeds duly executed, the said parties regularly conveyed their interest to him. For these deeds, reference is here made to the exhibits filed by this respondent to his original bill. Sometime after these purchases and the execution of said conveyances, it is true that the respondent did make with John Allen the contract filed by complainants as exhibit A, with their cross-bill;" but he claimed that Allen did not pay him the purchase money within five years or at any time, and having failed to do so, the contract became void. He admitted the execution of the receipt, and said that beyond this there could be no pretense of any payment, and he denied that he received all the money mentioned in that. He recollected distinctly that as part of the sum embraced in the receipt, a draft on John Jett for \$2,333, was included, and that it was protested and never paid. A part of the sum also was made up of debts of Vint which Allen assumed to pay for him, but never did. He then said: "The contract of which the \$11,600 aforesaid purports to have been paid, and the receipt for that sum, were not retained by this respondent in his hands, as complainants would seem to indicate, but were handed over to John Allen; and as the said Allen and his heirs are interested in said papers, this respondent supposed that they would take care of them and at all times have them at their command. This respondent has certainly never had said papers under his control, and this having been the case, it seems extraordinary to this respondent that the complainant should gravely charge him with improperly concealing contracts and papers which they must have known were never in his possession."

On the 17th of April, 1844, Alexander Findlay filed his cross-bill against Vint, in which he asked that the deed from Samuel King to Vint might be set aside for fraud. In this bill he charged that the deed was obtained by the fraudulent combination of Vint and John Allen to divest King of his interest in the estate, and stated that proof had already been made in the case that Vint had said he purchased this interest from Allen. He then stated that the actual consideration of the deed was \$6,000, payable in ten equal annual installments, for each of which a note was given; that none of these notes had been paid, and that Vint had nine of them in his possession. He charged that they were unfairly obtained by Vint, and probably in consequence of his dealings and combination with Allen; he called for an answer under oath.

To this cross-bill Vint filed an answer on the 8th of April, 1845, in which he adopted, as part of it, the answer which he had before filed to the cross-bill of Allen's heirs. He denied that the deed to him was obtained by fraud. He said that he could not undertake to say with certainty whether or not John Allen exerted any material agency in bringing about the sale by King, but denied all fraudulent combination

for that purpose. He admitted that the consideration was as stated in the cross-bill. All the notes were payable in negroes in Abingdon, cash price. The three notes first falling due were payable to King or his order. All the others unto the children of King by Patsey, his wife. He produced and made part of his answer, a receipt as follows:

"Received of John Vint three notes, each \$600, and seven notes to my heirs, each of them \$600, and likewise a conveyance of all my right and title to the estate of my deceased brother, William King. Now, let it be understood that I am to forward to John Allen, of Abingdon, said conveyance to said Vint, all my right and title to said estate, legally and completely done by me and my wife, or else said notes in number ten, amounting to six thousand dollars, payable by installments as said notes will show, all of them and each of them to be void and of no effect, if the conveyance is not forwarded in three months; if so, the notes to be good, etc.

SAM. KING.

1st January, 1811.

Attest: JOHN ALLEN, HANNAH ALLEN."

He then said that, in pursuance of this agreement, King did execute the deed in Kentucky, and under it he claimed title. He then said that Allen procured from King nine of the ten notes and delivered them to him, and the amount of these notes was included in the receipt for \$11,600 above stated. He said he received the notes in good faith from Allen, supposing he had obtained them fairly from King.

Vint died in 1847, and the cause was afterwards duly revived, his executor being made a party in his stead.

The testimony being closed the cause was heard, and on the 24th of September 1853, a decree rendered annulling the deed from King to Vint, and ordering a reconveyance; declaring that no conveyance was ever made by King to Allen of the one fifth of his interest. Adjudging costs in favor of Findlay and the heirs of King against Vint's representative; denying the prayer of the cross-bill of Allen's heirs for a rescission of the deed from Hannah and John Allen to Vint; denying the prayer for a specific performance of the contract of April 6, 1812, and ordering that the personal representative of John Allen be made a party with a view to the determination of the question presented by the further prayer of the cross-bill, for a return of the purchase money paid upon this contract.

On the 21st of November, 1872, the cause was again heard, and the cross-bill of Allen's heirs finally dismissed. From that decree this appeal was taken.

The first question we are to determine is as to the extent of our power over the several orders and decrees of the court below. The appellees claim that it is confined to an examination of the question of the return of the purchase money paid upon the contract of April 6, 1812, while the appellants insist that the appeal reaches back and includes the decree of September 24, 1853, so far as it relates to that part of the case in which they are interested. All agree that our inquiries are limited to the Allen title. The King title was disposed of adversely to the appellees in 1853, and they have not appealed.

In 1853 the court determined that it would

not decree a cancellation of the Allen deed, and would not order a specific performance by Vint of his contract. This determination it caused to be recorded, but at the same time declared that it could not then make a final disposition of the whole cause, because it did not have before it all the parties necessary for that purpose. In 1872, when the cause was ready for final hearing, the court accepted this recorded opinion as settling the rights of the parties, so far as it went, and then proceeded to consider the question which had not been determined. Upon this hearing that question was decided against the complainants in the cross-bill, and then a final decree was entered denying the relief asked by the defendants. This ended the case in the court below.

Cases cannot be brought to this court upon appeal in parcels. We must have the whole of a case or none. The court below must settle all the merits before we can accept jurisdiction. Appeals will lie, as has been frequently held, when nothing remains to be done except to enforce and give effect to what has been decreed, but until all the rights of the parties have been finally passed upon and settled this cannot be the condition of a cause. Nothing must be left below when an appeal is taken but to execute the decree.

That was not the condition of this case in 1858. An appeal then would have left the question of the return of the purchase money undetermined. The rights of the parties as presented by the pleadings were not all settled. The powers of the court below were not all exhausted. If the remaining question had been settled in accordance with the prayer of the cross-bill, the present appellants might have been satisfied and the appeal saved.

We are, therefore, of the opinion that the decree of 1853 was not final so far as it respects the Allen title, and that the appeal brings up the whole of that part of the case for our consideration.

It is first insisted by the appellants that a court of equity has no jurisdiction of the case, and that for this reason the bill should now be dismissed.

So far as we can discover from the record, this objection is raised here for the first time. The transactions out of which this case arises occurred sixty-five years ago, or thereabouts. The estate of William King has been the subject of litigation in some form or other during all that time. This particular suit was commenced thirty-six years ago and more. It is high time it was ended. At any rate, we are not inclined to add to its length of years by looking after mere form in order to avoid substance.

This brings us to the case upon its facts. The record is voluminous, but to our minds the controlling facts are few. In a court of conscience deliberate concealment is equivalent to deliberate falsehood. When a living man speaks in such a court to enforce a dead man's contract with himself against parties who he knows are ignorant of the facts, he must be frank in his statements, unless he is willing to take the risk of presumptions against him.

In this case Vint waited until both Allen and his wife were dead before he attempted in any manner to assert his claim. This he had the legal right to do. His laches is not a bar, but

it is still a fact, and when it is remembered that some of the parties he is now pursuing were not born until after his rights, if any he has, accrued, this silent fact has all the effect of positive statement.

The rights of Samuel King's heirs are not before us for adjudication; but the facts upon which their rights depend cannot easily be separated from those we must consider.

Allen and Vint seem to have been almost inseparable when the transactions we are to pass upon occurred. King was a man of intemperate habits. His half brother, William, from whom the property in controversy came, made provision in his will for the payment to him of the sum of \$150 annually, so long as he lived, in case he applied for it personally to the manager of the salt-works at Saltville, or the executor of the will at Abingdon, on the first day of January in each year. His personal receipt was required, and the payment for the year was to be forfeited if not called for on the day.

He lived in Kentucky, and Allen and Vint at Abingdon. His contract to sell to Vint bears date January 1, 1811. That was the day he was required to be at Saltville or Abingdon to receive his annuity. The contract was witnessed by Allen and wife, and the notes given for the purchase money, all bearing that date, were witnessed by Allen. The note first falling due was assigned by him to Allen on the 2d of January, 1811, the day after its date. From these admitted facts the conclusion is irresistible that King was in Virginia when the contract was made, and that Allen must have been cognizant of it, if not active in bringing it about.

In January, 1812, King was again at Abingdon. While there he staid at Allen's house. In the month of February, or the fore part of March, he started for his home in Kentucky. He stopped for the night at a house about sixty miles from Abingdon, and was never afterwards seen. He left his saddle-bags at the house where he stopped, and these were afterwards taken to Allen's house and opened by Allen's wife. When opened they were found to contain his clothing and a pocket-book. In the pocket-book were papers, but no money.

The deed from the Allens to Vint bears date Nov. 16, 1810, and was executed by Mrs. Allen on that day. It was not proved for record until May 7, 1812. Its execution appears first to have been attested by three witnesses, and then, on the 27th April, 1812, at the request of Allen, by two more. The presumption is, therefore, that it had not been delivered before that time.

On the 6th April, 1812, Vint made his contract for the conveyance to Allen's children of one half of the property covered by the two deeds. On the next day Vint executed his receipt for the payment of \$11,600, part of the purchase money. Part of this payment consisted of nine out of the ten notes given by Vint for the purchase of the King interest. It cannot for a moment be doubted that Allen had no title to these notes, and that Vint knew it. So far as appears by the testimony none of them were indorsed when surrendered, and seven out of the nine were payable to the children of King. The disappearance of King caused much excitement at the time, and was extensively known. The persons at whose house he

stopped for the night had been suspected of his murder. Allen was poor, and in the summer following he and Vint were in jail together for debt. In the face of all these circumstances it is impossible to believe that Vint told the truth when in his answer to the cross-bill of Findlay he stated that he received the notes "As he believed from one who had a right to their possession, and whose right to transfer them to him was unquestionable."

As has been seen, Allen's deed could not have been delivered until after the 27th of April, 1812. The presumption is, therefore, that payment for the property had not been made previous to that time. Allen was not a man to be trusted, even by Vint, with so large a payment as the nominal consideration required without a delivery of the deed. The deed had been drawn with great care, as the scrivener testifies, because the transaction was important. If the contract had been fully consummated in good faith at its date, there can scarcely be a doubt that the deed would have been at once perfected and proved for record. This, as we think, disposes of the theory that the property had been paid for by Vint with his stock of goods in 1810. Vint did not set up any such claim in any of his answers, and most assuredly he would have done so if it had been true. Besides that, no satisfactory testimony has been adduced in support of the claim. The only witnesses who testify upon the subject speak very indefinitely, and one of them makes some statements which are directly contradicted by well established facts. In Sep. 1812, Vint himself stated, in an affidavit, "That on or about the 16th Nov. 1810, he purchased from Allen all his interest in the estate of William King, deceased, and after that, purchased from Allen all of the interest of Samuel King in said estate, for which he was to give and did give credit on a debt due from him to affiant for \$10,000." There is nothing here about a payment in goods, and besides, according to the affidavit, the King purchase entered as much into the credit as did that of the Allen interest.

But still more important is the absolute refusal of Vint to disclose the facts in his answers when directly called upon to do so. It is true that he need not make the statements unless he chose. The law under the form of pleadings in this case did not compel him to be more specific, but it can raise presumptions against him if he is not. He may, if he pleases, rest his case upon the acknowledgment of payment expressed in his deeds, but if he does he must take the chances of being overcome by other facts and circumstances which repel the presumption arising from such evidence. In this case the circumstances are emphatic. He slept upon his rights for a quarter of a century; he waited for every actor in the premises except himself to die; in all the litigation affecting his interests he never appeared so long as there was one alive who could speak against him from actual knowledge of the facts, and during all the time he permitted his adversaries to assume and represent his title.

But we are not inclined to pursue this inquiry further. To our minds it is clear that in April, 1812, when the transactions upon which the rights of the parties depend were completed, it was well understood by all that the original interest of Mrs. Allen in the estate of her brother

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had been in some form secured to her children. It is quite possible it may also have been understood that Vint was to have a lien upon it by way of security for the payment of some debt owing to him; but it is certain, as we think, that it was never intended he should hold it as owner.

When, therefore, Vint came into court and asserted his absolute title as against the ignorant heirs of these deceased contracting parties, and willfully concealed his contract for a reconveyance and the receipt which belonged to it, he came with unclean hands and must suffer the consequences. He does not excuse himself for this attempted fraud by pleading defect of memory, but claims boldly that he was not required to tell all he knew; that his duty was at an end when, selecting his own facts, he presented his own case. It is true he had the right to select that way of coming into court, but having deliberately made his selection he ought not to be surprised if he finds that he is received with suspicion. Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud.

If Allen and Vint were the only parties interested in this controversy, the case would be different. They have been partners in fraud and neither can claim a preference over the other on account of honesty of purpose or fairness in dealing. But Allen's interest in the property was only that of a tenant for life. The real owner was his wife, and upon her death her children succeeded to her rights. It is the title of these children that Vint now attempts to defeat. By his own admissions in commencing his proceedings against them he concealed the truth. He thus in effect confesses that he relied to some extent for his success upon their ignorance. After years of groping in the dark, they were able to confront him with the facts and, as we think, to defeat the case he has attempted to make against them.

The decree of the Circuit Court is reversed and the cause remanded, with instructions to enter a decree dismissing the bill of the complainants and granting the prayer of the cross-bill for a cancellation of the deed from Allen and wife to Vint.

Cited—106 U. S., 4.

CHARLES W. SLACK, COLLECTOR OF INTERNAL REVENUE, *Plff. in Err.*,

v.

WILLIAM W. TUCKER ET AL., Partners, doing Business under the Name and Style of UPHAM, TUCKER & Co.

(See S. C., 23 Wall., 321-331.)

Commission merchants taxed as wholesale dealers—commercial brokers, how taxed—difference between—who are commission merchants—manufacturers' tax.

1. Under the Internal Revenue Act of June 30, 1864, as amended in 1866, Congress intended to tax as wholesale dealers those who sold goods as commission merchants as well as those who sold on their own account, and to tax as commercial brokers those who as brokers merely negotiated sales or purchases for others, and not in their own names nor on their own account.

2. The difference between a commission merchant and a broker is, that the former buys and sells in his own name, and has the goods in his possession; while a broker cannot ordinarily buy or sell in his own name and has no possession of the goods sold.

3. Where the plaintiffs made the sales themselves, in their own names, at their own store and on commission, and had possession of the goods as soon as the sales were made, and delivered or shipped them to their customers, they were commission merchants as contradistinguished from mere brokers or agents.

4. The fact that the manufacturing corporations, whose goods were sold, paid the manufacturing tax of five per cent. on the same goods, does not prevent the assessment of the tax on the commission merchants who sold them.

[No. 679.]

Argued Mar. 30, 1875. Decided Apr. 19, 1875.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Messrs. Geo. H. Williams, Atty-Gen., and S. F. Phillips, Solicitor-Gen., for plaintiff in error:

We submit that Upham, Tucker & Co. were wholesale dealers.

The revenue law in question, 1866, ch. 184, sec. 9, 14 Stat. at L., 115, after laying upon wholesale dealers a tax of \$50, if their annual sales do not exceed \$50,000, and also a tax of one dollar on each additional thousand in excess of \$50,000, gives the following definition: "Every person shall be regarded as a wholesale dealer whose business it is, for himself or on commission, to sell or offer to sell any goods wares or merchandise, of foreign or domestic production, not including wines, spirits or malt liquors, whose annual sales exceed \$25,000."

By the record it appears that Upham, Tucker & Co. were persons whose sole business it was, for a commission, to sell goods, as agents, for certain manufacturers, and who sold such goods to an amount beyond \$25,000; *i. e.*, to an amount of about \$1,000,000 per annum.

Therefore, if there were nothing more to affect this question than the statutory provision above quoted, the defendants in error were clearly wholesale dealers, and liable to the tax collected.

It will probably be admitted that if Upham, Tucker & Co. had carried on their commission business for any other principals than manufacturers, they would be subject to the tax.

There appears to be no reason why they should not as well pay a tax upon business given them by manufacturers, as upon business from any other quarter.

Mr. Henry D. Hyde, for defendants in error:

A corporation can only act through agents; and the defendants were the agents of several corporations for selling their goods. That they were such agents appears from their course of dealing, and from the admitted fact that "There were separate agreements, either in writing or by parol, that the defendants should sell all the goods manufactured by each corporation, for a fixed percentage on the amount of sales." The ownership or possession of the goods never passed from the several corporations to the defendants. The transactions of each corporation were kept on separate books; separate bills of goods of each corporation when sold were rendered; all expenses of transportation were paid by the respective corporations;

and all notes taken for the payment of goods sold were the property of each corporation, and were delivered to its treasurer. The defendants were known to be the agents of these corporations to sell their goods. An action could have been maintained by or against the several corporations upon the contract of sale.

If the defendants were the agents of the respective corporations for selling their goods, were the goods sold at such a place that no tax could be assessed upon the sales? It is admitted that only samples were kept at the place of sale.

The defendants sold all the goods of each corporation; none were sold at the place of production or manufacture. The only place where the goods were sold, was the place where the defendants sold them. This place was, then, not only their principal office or place of business for selling, but it was their only office or place of business for that purpose.

The purpose of a corporation in manufacturing goods is, that it may sell them and thereby realize a profit. The goods are manufactured to sell and, after they are manufactured, the principal business is to sell them. It is hardly fair to suppose that Congress intended to distinguish between the relative importance of the duties of the treasurer and selling agent of a corporation, but that the corporation, having paid the tax upon its production, should be allowed to sell its own goods through its own agents, at the place of production, or at its office or principal place of business for selling. This view of the law is sustained by section 82 of the Act of 1864, 13 Stat. at L., 258, which was not changed by the Act of 1866, which provides that "Every person shall furnish, without previous demand therefor, to the assistant assessor, a statement, subscribed and sworn to or affirmed, setting forth the place where the manufacture is to be carried on, and the principal place of business for sales."

Mr. Justice Bradley delivered the opinion of the court:

This was a suit brought by the defendants in error against the plaintiff in error, who was a Collector of Internal Revenue, to recover the amount of certain taxes paid by the former under protest, and alleged to have been illegally assessed. The circuit court having tried the cause without a jury, held the tax illegal and a recovery was had. This writ of error is brought by the Collector to reverse the judgment.

The tax was assessed against the defendants in error as wholesale dealers, under the 79th section of the Internal Revenue Act of June 30, 1864, as amended by the Act of June 13, 1866, 14 Stat. at L., 115. It was agreed on the trial that if, upon the facts, the court should decide that the plaintiffs, in the cause below, were not liable to the tax as wholesale dealers, but were liable to a tax of one half the amount as commercial brokers under the 14th clause of the 79th section and under the 99th section as amended, judgment should be rendered in their favor for half the amount claimed, and interest, subject to the defendants' exceptions.

The statutory provisions referred to, and on the construction of which the case principally depended, were expressed in the following terms:

First. As to wholesale dealers, the 79th section, as amended, provided thus:

"Wholesale dealers whose annual sales do not exceed \$50,000, shall pay \$50, and if their annual sales exceed \$50,000, for every additional \$1,000 in excess of \$50,000, they shall pay one dollar. * * * Every person shall be regarded as a wholesale dealer whose business it is, for himself or on commission, to sell or offer to sell any goods, wares or merchandise of foreign or domestic production, not including wines, spirits or malt liquors, whose annual sales exceed \$25,000." 14 Stat. at L., 115.

An exception was made in favor of manufacturers selling their own goods, by section 74, as amended by the Act of July 13, 1866, 14 Stat. at L., 113, which provides: "That nothing herein contained shall require a special tax for * * * the sale by manufacturers or producers of their own goods, wares and merchandise, at the place of production or manufacture and at their principal office or place of business; provided no goods, wares or merchandise shall be kept except as samples at said office or place of business."

Second. As to commercial brokers, the 14th clause of the 79th section, as amended in 1866, provided as follows:

14 Stat. at L., 117. "Commercial brokers shall pay \$20. Any person or firm whose business it is as a broker to negotiate sales or purchases of goods, wares or merchandise, or to negotiate freights and other business for the owners of vessels, or for the shippers or consignors or consignees of freight carried by vessels, shall be regarded a commercial broker." And section 99, as amended, provides: "And there shall be paid monthly on all sales, by commercial brokers of any goods, wares or merchandise, a tax of one twentieth of one per centum upon the amount of such sale." 14 Stat. at L., 134. Under these statutes the plaintiffs below claimed: 1. That the sales made by them were made as mere agents of the manufacturers at their principal office and place of business, and, therefore, came under the exemption provided in section 74, above quoted. 2. That, at most, they were commercial brokers and, therefore, liable for only one half of the amount for which they were assessed.

The facts on which they relied in support of these claims sufficiently appear from the bill of exceptions taken by the defendants on the trial of the cause. It was shown by the testimony of the plaintiffs themselves that four manufacturing corporations, two of them having their manufactories at Nashua, New Hampshire, and chartered by that State, two of them having their factories at Waltham and Clinton, in Massachusetts, and chartered by the latter State, and all manufacturing cotton goods, had the same general office in Boston, where they held their meetings, transacted their business and kept their records, and where they kept a common clerk and a common treasurer. The latter was the chief executive officer, buying all the raw material and making the other purchases for the Corporations, taking care of their finances and, under the Respective Boards, which consisted substantially of the same persons, managing and controlling the affairs of the several Corporations, their agents and servants.

Between these Corporations respectively and

the plaintiffs, who were a mercantile firm transacting business in Boston, under the name of Upham, Tucker & Co., there were separate agreements, either in writing or by parol, that the plaintiffs should sell all the goods manufactured by each Corporation, for a fixed percentage on the amount of sales, and the course of business of the plaintiffs, and under and in pursuance of these agreements, was as follows: They, the plaintiffs, had a store in Boston, which they hired in their own name and for which they paid the rent, with clerks, bookkeepers and other servants, whom they employed and paid. In this store was a counting-room, in which their business was transacted, and chambers where samples of goods manufactured by the Corporations were kept. No goods except sample bales and packages were there kept, unless occasionally some goods which had been mis sent, or for some reason had not been accepted by a customer, found their way there.

The plaintiffs were known to be the agents of these Corporations, to sell their goods, and they sold only the goods of these Corporations, and their course of business was as follows: they were kept informed daily of what was manufactured at the several mills, and made sales to purchasers as opportunity offered. They kept in their office a different set of books for each of the Corporations, and when a sale of any of the goods of any of the Corporations was effected, an entry of the fact was made in the books of that Corporation, and they notified the manufacturing agent at the mill of such Corporation, where all the goods were stored as they were manufactured, to send such goods to the purchaser. The goods were then packed at the mill and directed to the purchaser, and forwarded to Boston by rail, where a truckman, employed and paid by the plaintiffs, received them and delivered them to the purchaser if in Boston, or at the steamboat landing or railroad station, if the goods were to be sent elsewhere. The freight by rail, from the mill to Boston, was paid by the plaintiffs, and was, with the expense of truckage, charged by them to the respective Corporations. When sufficient time had elapsed after the sale for the delivery of the goods, the plaintiffs sent to the purchaser a bill of the goods in their own names, separate bills being rendered for the goods of each Corporation, and not as agents; and in due course, when they were settled, receipted the bills in their own names, and not as agents. When the bills were paid in cash, the money was received by the plaintiffs and deposited in bank in their own names; and if on any given day money was received from sales of the goods of the different Corporations, such money was mingled together and deposited by plaintiffs in their own names. If the bills were settled by notes, the notes were made payable either to the order of the makers and by them indorsed, or to the order of the particular Corporation whose goods were sold. The plaintiffs did not put their names upon any such notes, nor did they guaranty any of their sales. They delivered these notes from time to time to the treasurer, and from time to time paid him money, and every month settled their account with each Corporation.

The plaintiffs had a branch house in New

York, and an agency in Philadelphia, and the sales in New York and Philadelphia, were reported to the Boston house, and deliveries and collections were made as to such sales in the same manner as the sales at the Boston house. Such sales were not included in their returns to the assessor at Boston, and no part of the taxes which this action is brought to recover were paid upon such sales at New York and Philadelphia.

Upon this evidence adduced by the plaintiffs, the defendant moved for judgment on the following grounds:

1. Admitting all that was attempted to be proved, it manifestly appeared that the plaintiffs were wholesale dealers within the meaning of the law, and so liable to pay the tax collected. 2. That the sales made by the plaintiffs were not sales made by the manufacturing Corporations within the meaning of the law. And 3. If the sales were made by the plaintiffs as agents of the manufacturing Corporations within the meaning of the law, they were not made at the place of manufacture nor at the principal office or place of business of the Corporations, but were made at the store of plaintiffs.

The court overruled the motion and ordered judgment to be entered for the plaintiffs for the full amount claimed.

This judgment must be reversed if, upon the evidence as disclosed, the defendants in error were either wholesale dealers or commercial brokers within the Act. In the one case they could have recovered nothing; in the other, only one half of what they did recover.

The general meaning of the Act in the passages above quoted is sufficiently clear. Congress evidently intended to tax as "wholesale dealers" as well those who sold goods as commission merchants as those who sold on their own account; always excepting manufacturers, selling at the place of manufacture, or by sample at their principal office and place of business. The intention is equally evident to tax as commercial brokers those who, as brokers merely, negotiated sales or purchases for others, and not in their own names nor on their own account.

We are clearly of opinion that the evidence propounded by the plaintiffs showed that the sales were not the sales of the Corporations made by the plaintiffs as mere agents; much less that they were made at the principal office or place of business of the Corporations. The latter had an office and place of business of their own where their principal executive officer managed their executive and financial operations, and to which any persons having business with the Corporations would naturally go. On the contrary, the store of the plaintiffs was their own store, hired and furnished by themselves. The clerks employed in it were their own clerks. All the expenses were paid by themselves. The business was carried on in their own names. The sales were made and the bills made out in their names. The money arising from the sales was paid to them and deposited to their account. They charged regular commissions on the sales. It is true they sold by sample, and did not keep the goods in their store; but that did not make the sales any less their own. Persons selling their own goods often do the same. But, though

they did not keep goods at their store, and though, as sales were made, the goods by their direction were put up at the mill and directed to the purchasers, yet they were sent to and received by the plaintiffs who delivered them if the purchasers were in Boston, or shipped them if the purchasers resided elsewhere. The goods passed through their hands before the purchaser received them. They came into their possession as soon as it was necessary to enable them to fulfill their contracts of sale.

In our opinion, therefore, the plaintiffs were commission merchants, and chargeable, as such, with the tax in question as wholesale dealers. The difference between a factor or commission merchant and a broker is stated, by all the books, to be this: a factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold. See, Story, Sales, sec. 91; Story, Ag., sec. 34; 2 Kent. Com., 622, n., and cases cited. The plaintiffs made the sales themselves, in their own names, at their own store and on commission, and had possession of the goods as soon as the sales were made, and delivered or shipped them to their customers. This course of business clearly constituted them commission merchants as contradistinguished from mere brokers or agents.

The fact that the Corporations paid the manufacturing tax of five per cent. on the same goods, is of no consequence at all in deciding the case. The tax in question was not imposed upon the Corporations, but upon the commission merchants, as a tax on their business. It would even have been imposed on the Corporations themselves if they had sold the goods in any other manner than as provided in the 74th section of the Act, namely: at the place of manufacture, or, by sample, at their principal office and place of business.

We are of opinion, therefore, that upon the evidence adduced, the court ought to have given judgment for the defendant instead of the plaintiffs.

The judgment is reversed, with directions to award a venire de novo.

Mr. Justice Field, dissenting:

I dissent from the judgment of the court, being of opinion that the plaintiffs were not wholesale dealers, either within the common acceptance of the terms or the meaning of the statute.

THE STEAM TUG CLARA CLARITA.
HER ENGINE, ETC., THE NEW YORK
HARBOR PROTECTION COMPANY, Claimant,
Appt.,

v.

AUGUSTUS M. COX ET AL.

(See S. C., "The Clarita and The Clara," 23 Wall. 1-19.)

Steam tug, when responsible for damages caused by tow—collision—inevitable accident—burden of proof—watch—unsafe hawser—salvage.

1. A steam tug, which undertook to transport a burning ferry-boat from one place to another, in

the absence of the officers and crew of the tow, must be held responsible for the proper navigation of both vessels.

2. Third persons suffering damage through the fault of those in charge of the steam tug can, under such circumstances, look to the steam tug, her master or owners, for damages which they sustain on account of any injuries to their vessel or its cargo, by the burning ferry-boat colliding with their vessel.

3. The owners of the ferry-boat are not responsible for the consequences of the collision, where the officers and crew of the steam tug were the agents of the owners of their own vessel, and not of the burning ferry-boat.

4. The defense of inevitable accident can never be sustained where it appears that the disaster was caused by negligence.

5. Where the collision occurred on a fair, clear evening and in the open harbor, and the injured schooner was lying at anchor with the signal-light displayed, required by the Act of Congress, the burden of proof is upon the steam tug, to show that she was without fault, or that the collision was occasioned by the fault of the schooner, or that it was the result of inevitable accident.

6. The schooner was not in fault for not having sufficient watch, as the Act of Congress contains no such requirement, and as the schooner was anchored in a proper place and one of her crew was on deck.

7. The part of the hawser made fast to the burning ferry-boat should have been chain; and as it was unsafe to use one made of manilla and, as a chain hawser might easily have been procured, it was negligence to use manilla.

[No. 230.]

Argued Apr. 22, 1875. Decided May 3, 1875.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court. See, also, the next case, which arose on a claim for salvage, made by the tug for assisting to extinguish the fire on the schooner.

Mr. C. Van Santvoord, for appellant:

Under the pressure, in fighting the fire, of the necessity of an immediate removal of the boat to prevent the spread of the conflagration, the Superintendent of the Ferry Company, either with or without the concurrence of the Engineer of the Fire Department, who was present, had a lawful right to direct the boat to be towed out of the slip; and the tug, upon that order or direction, had a lawful right to undertake to tow her out with such hawsers as she was provided with and were at her command in the emergency, although not incombustible, and although there might be reason to expect a loss of temporary or other control of the boat after towing her out, from the burning of the hawser, from the fire bursting forth or spreading on the boat, and without being responsible for damage that might happen to vessels in the harbor, or other property afloat, which the tug could not prevent. This, on the principle that the fire, like a flood suddenly bursting forth, is a common enemy against which every man has a right to defend himself with such means as he may have at hand, although it may involve risk of loss to others.

Nield v. Lond. & Northwestern R. Co., L. R., 10 Exch., 7; *S. U.*, L. R. 10 Exch., 4; *Menzies v. Earle of Breadalbane*, 3 Bligh (N. S.), 414; *Torbush v. Norwich*, 38 Conn., 225.

But, further, the undertaking to tow this boat out of the slip, being necessary to prevent the spread of the conflagration on the boat, to the wharves and adjacent buildings, was, in contemplation of law, an act done for the Commonwealth, which any man may do without being liable to an action.

monwealth, which any man may do without being liable to an action.

As a justification or ground for exemption from liability, it is of the same power as the happening of loss or damage by the act of God, as by tempest or other irresistible force.

Mayor of N. Y. v. Lord, 17 Wend., 285, 290; *Maleverer v. Spink*, 1 Dyer, 35 b, 36 b (40); *Respublica v. Sparhawk*, 1 Dall., 357, 363, McKean, Ch. J.; *Mouse's case*, 12 Coke, 63; *Governor v. Meredith*, 4 T. R., 797, Butler, J.

It being lawful, to prevent the spread of a conflagration, to destroy another man's property by direct act, it is lawful to do an act to prevent the spread of a conflagration, although involving contingent risk of damage to the property of another, which is less. The former, as the greater, includes the latter.

After the ferry-boat had been hauled clear of the schooner, the captain and crew came in a boat to the tug and asked for an ax to scuttle the schooner, which was given to them. At the same time the master of the tug said to them: "Don't be afraid, we will come and put the fire out." This assurance prevented the scuttling of the schooner, and as soon as the tug could get clear of the ferry-boat, then sinking, by cutting her hawser, the tug was hauled alongside the schooner, off her starboard side, head down the river, and attached by lines to her side and, by the use of her steam pump and hose, after three or four hours of exertion, extinguished the fire. In doing this the tug was herself exposed to danger from the flames, and also her crew, and she succeeded in saving, for her owners, the vessel in the condition in which she was after being burnt, worth from \$16,000 to \$17,000, which otherwise would have been destroyed.

The Comanche, 8 Wall., 448 (75 U. S., XIX., 397); *The Blackwall*, 10 Wall., 1 (77 U. S., XIX., 870); *The Delphos*, 1 Newb. Adm., 412; *The T. P. Leathers*, 1 Newb. Adm., 421, at 425; *The Golden Light*, Lush., 855.

In the place where the schooner was, near the middle of the river, in the direct track of vessels moving up or down, they should have had a watch on deck, and this omission should have been held to charge the schooner with fault, for which the damage should be divided if the tug should be adjudged to have been in fault.

The Indiana, Abb. Adm., 830; *Olapp v. Young*, 6 Law Rep., 11; *The Sapphire*, 11 Wall., 164 (78 U. S., XX., 127).

Mr. E. H. Owen, for appellees:

The tug was in fault, and the sole cause of the collision and damages.

Knowing that the ferry-boat was extensively on fire, and that the flames might burst forth at any moment and envelop the entire boat, without having any interest at risk or any duty to perform, she voluntarily, for a compensation, undertook to haul the ferry-boat out of her slip and around upon the flats, in doing which, she allowed the ferry-boat to get adrift, and to drift upon and set fire to the schooner.

Although the burden of proof, under the circumstances, is upon the tug to excuse herself, yet no sufficient excuse has been shown. The drifting of the ferry-boat did not arise from any inevitable accident, because the tug did not use the necessary and proper precautions to avoid

it. "It is not an inevitable accident when a master proceeds carelessly on his voyage, and afterwards circumstances arise when it is too late for him to do what is fit and proper to be done.

The Juliet Erskine, 6 Notes of Cas., 633, approved in *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, 24 How., 813 (65 U. S., XVI., 701); *The Louisiana*, 3 Wall., 164 (70 U. S., XVIII., 85); *The Grace Girdler*, 7 Wall., 196, 203 (74 U. S., XIX., 118, 116).

Concede that the owners of the ferry-boat had a lawful right to remove her from the slip; yet that in nowise justified the tug in undertaking such removal without the exercise of due care and precaution to prevent her from getting adrift and colliding with other vessels. The danger of moving the ferry-boat in her situation was extraordinary, and required more than usual precaution to secure and retain control of her.

But such precaution was not exercised, nor did the tug exercise even ordinary prudence in the matter. It was exceedingly improper for her even to attempt to tow the burning boat out of her slip, and yet she undertook to tow her a mile or more to the flats, through numerous vessels lying at anchor, and that with a manilla hawser.

Sturgis v. Boyer, 24 How., 110, 122 (65 U. S., XVI., 591, 594).

The schooner was not in fault.

She was lawfully and properly lying at anchor, with a good and sufficient light set in her fore-rigging, burning brightly. This is not disputed.

That she had no sufficient anchor watch on duty at the time, was not a fault. The statutory rules did not require such a watch. All that is required of a vessel at anchor, is to have a proper light displayed. 13 Stat. at L., 59, art. 7.

The claim for salvage, under all the circumstances, is unconscionable. The idea that the owners of the tug should claim salvage, after having set the schooner on fire by their negligence, because she returned and assisted in extinguishing the fire, is preposterous.

Even if the schooner had been in fault, in lying where and as she did, yet the tug was clearly in fault, and that deprives her from making any claim for salvage, because she rendered the service for her owners' benefit.

Cargo ex. Capilla, L. R., 1 Adm. & Eccl., 356; *The Iola*, 4 Blatchf., 31.

Mr. Justice Clifford delivered the opinion of the court:

Marine torts as well as maritime contracts are cognizable in the admiralty, and where the redress sought is for an injury caused by one ship or vessel to another, the remedy of the owner of the injured ship or vessel may be, either by a proceeding *in rem* or by a suit *in personam*, at the election of the owner, if the offending ship or vessel is found within the district where the suit is instituted.

Damages are claimed in this case by the owners of the schooner Clara against the steam tug Clara Clarita, for that the latter negligently and wrongfully caused the ferry-boat James Watt, which the steam tug had in tow and which was at the time on fire, to run into the

schooner while she was lawfully lying at anchor as alleged in the libel, whereby the schooner was also set on fire and sustained serious injuries and damage, as they allege, to the amount of \$7,000.

Process was served and the owners of the steam tug appeared and filed an answer. They admit in their answer that the ferry-boat was on fire, and allege that the steam tug went to her assistance, and that those in charge of the steam tug, finding it impossible to extinguish the fire, decided to remove her from her anchors, and that for that purpose they made fast a hawser to her and towed her out into the stream, with the intent to move her up the river to the Hoboken Flats, where, as they believed at the time, she could be beached in safety.

Throughout the period of that maneuver, the allegation of the answer is, that the fire was below the deck; but it is conceded that the flames, after the boat was moved from her slip, suddenly broke out through the deck, and that the hawser by which she was being towed was burned off, and that the burning boat floated adrift into the stream. Two other attempts were made to make fast to the burning ferry-boat, both of which were ineffectual to accomplish the intended purpose. One, for the same reason as the first attempt, because the hawser was burned off; and the other, for the reason that the fastening pulled out or gave way; and it is conceded in the answer that the ferry-boat then went adrift, and that she floated by the force of the wind and a flood tide against the schooner of the libelants, which thereupon caught fire before the ferry-boat could be dragged away.

Testimony was taken on both sides, and the district court entered a decretal order that the libelants do recover the damages which they sustained by reason of the collision, and refer the cause to a commissioner to compute the amount. Due notice having been given of the time and place of hearing, the parties appeared before the commissioner, and they having been fully heard, he reported that the damage sustained by the schooner, including demurrage, amounted to \$5,989.72.

Exceptions were taken by the respondents to the report of the commissioner, the first of which was sustained by the court, which reduced the amount reported to the sum of \$5,957.08, as appears from the final decree of the district court. Subsequently the respondents appealed to the circuit court where new testimony was taken and, the parties having been again heard, the circuit court entered a final decree affirming the decree of the district court; whereupon the respondents appealed to this court.

Two errors are assigned, in substance and effect as follows: that the circuit court erred in affirming the decree of the district court. 2. That the schooner was in fault in not keeping a competent watch as she lay at anchor, and that the circuit court erred, even if the steam tug was also in fault, because the damages should have been divided.

Vessels engaged in commerce are held liable for damage occasioned by collision on account of the complicity, direct or indirect, of their owners, or the negligence, want of care or skill on the part of those employed in their navigation. Owners appoint the master and employ the crew and, consequently, are held responsi-

ble for their conduct in the management of the vessel. *Sturgis v. Boyer*, 24 How., 128 [65 U. S. XVI., 595].

Whenever, therefore, a fault is committed whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. Consequences of the kind, however, do not follow when the person committing the fault does not in fact or by implication of law stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel sustain, in some way, towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel.

By employing a tug to transport their vessel from one place to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service, as they neither appoint the master of the tug nor employ the crew, nor can they displace either one or the other. Their contract for the service, even though it was negotiated with the master of the tug, is, in legal contemplation, made with the owners of the vessel employed; and the master of the tug continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation and management.

Apply those rules to the case before the court, and it is clear that the owners of the burning ferry-boat are not liable for the consequences of the collision, as the evidence shows to a demonstration that the steam tug was in the charge of her own master and crew, and that those in charge of her undertook, in the usual and ordinary course of her employment, to transport the burning ferry-boat from one place to another over waters where such accessory motive power is usually employed, and consequently that the steam tug, in the absence of the officers and crew of the tow, must be held responsible for the proper navigation of both vessels, and that third persons suffering damage through the fault of those in charge of such motive power must, under such circumstances, look to the steam tug, her master or owners, for the recompense which they are entitled to claim on account of any injuries that their vessel or cargo may receive by such means.

Whether the party charged ought to be held liable is made to depend, in all cases of the kind, upon his relation to the wrong-doer. Where the wrongful act is done by the party charged, or was occasioned by his negligence, of course he is liable, and he is equally so if it was done by one towards whom he bears the relation of principal; but the liability ceases, in such a case, where the relation of principal and agent entirely ceases to exist, unless the wrongful act was performed or occasioned by the party charged. Grant that, and it follows beyond peradventure, that the owners of the ferry-boat are not responsible for the consequences of the collision, as it is clear that the officers and crew of the steam tug were the agents of the owners of their own vessel and not of the burning ferry-boat.

Suppose that is so; still it is insisted by the respondents that those in charge of the steam tug were without fault; that the collision, as

See 28 WALL.

far as they are concerned, was the result of inevitable accident, though they insist that it might have been prevented by proper care on the part of those in charge of the schooner.

Obviously, the defense of inevitable accident finds no support in the evidence, even upon the theory assumed by the respondents, as they insist that the collision was occasioned by the fault of the schooner. Such a defense can never be sustained where it appears that the disaster was caused by negligence, for if the fault was committed by the respondent alone then the libelant is entitled to recover; or if by the libelant, then the libel must be dismissed; or if both parties were in fault then the damages must be apportioned equally between the offending vessels. *The Morning Light*, 2 Wall., 557 [69 U. S., XVII., 868]; *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, 24 How., 818 [65 U. S., XVI., 701]. Unless it appears that both parties have endeavored, by all means in their power, with due care and a proper display of nautical skill, to prevent the collision, the defense of inevitable accident is inapplicable to the case. None of the circumstances given in evidence favor such a theory, as the collision occurred on a fair, clear evening and in the open harbor; and, inasmuch as the primary cause that led to it was one which ought to have been foreseen and removed by the employment of other means to attach the two vessels together it is plain that the case is one of fault. *The Erskine*, 6 Notes of Cas., 688.

Two faults are imputed to the schooner: (1) That she was anchored in an improper place. (2) That she had no watch on deck.

1. Argument to show that the collision occurred is unnecessary, as the fact is admitted; and it is equally clear that the schooner was lying at anchor with the signal-light displayed, required by the Act of Congress, and under those circumstances the rule is well settled that the burden of proof is upon the respondents to show either that the steam tug was without fault or that the collision was occasioned by the fault of the schooner, or that it was the result of inevitable accident. *Mfg. Co. v. The John Adams*, 1 Cliff., 418; *The Lochlibo*, 8 W. Rob., 810; 1 Pars. Ship., 578.

Neither rain nor the darkness of the night nor even the absence of a light from a vessel at anchor, said this court, nor the fact that the moving vessel was well manned and furnished and conducted with caution will excuse such moving vessel for coming in collision with the vessel at anchor in a thoroughfare out of the usual track of navigation. *Steamship Co. v. Caldwell*, 19 How., 246 [60 U. S., XV., 614].

Mr. Parsons lays down the rule that if a ship at anchor and one in motion come into collision, the presumption is that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been. 1 Pars. Ship., 578; *The Granite State*, 8 Wall., 810 [70 U. S., XVIII., 179].

Undoubtedly if a vessel anchors in an improper place she must take the consequences of her own improper act. *Strout v. Foster*, 1 How., 89. But whether she be in a proper place or not, and whether properly or improperly anchored, the other vessel must avoid her if it be reasonably practicable and consistent with her own safety. *Knowlton v. Sanford*, 82 Me., 148;

The Batavier, 40 Eng. L. & E., 20; 1 Pars. Ship., 574.

Attempt is made in argument to show that the schooner was anchored in an improper place, but both the subordinate courts were of a different opinion, and the court here, in view of the whole evidence, concurs in the conclusion that that defense is not sustained.

2. Concede all that, and still it is contended by the respondents that the schooner was in fault because she did not have a sufficient watch; but the Act of Congress contains no such requirement and, inasmuch as the evidence shows that the schooner was anchored in a proper place and that one of her crew was on deck, the court is of the opinion that the charge of fault made against the schooner in the answer is not sustained.

Briefly stated, the principal facts, are that the steam tug is a vessel owned, equipped and employed in the business of towing vessels in the harbor of New York, and in aiding, protecting and saving wrecked vessels or vessels in distress and their cargoes, and fitted and prepared to render assistance to vessels on fire, or such as are threatened with conflagration. Manned and equipped as described, the steam tug, in the evening of the first of August, 1870, was lying by her wharf at the foot of Canal Street, in the North River, when those on board discovered that the ferry-boat lying in a slip on the New Jersey shore was on fire. Being all ready, they proceeded immediately across the river to render assistance to the burning ferry-boat.

They passed their hose on board the ferry-boat and used their best efforts, with the appliances in their possession, to extinguish the flames, without success; and when it became apparent that the fire could not be subdued by such means, they, at the request of the master of the ferry-boat, took her in tow with a view to drag her from the slip where she lay, and to transport her to some other safe place where, even if she could not be saved, she could be beached and prevented from causing damage and danger to other property.

What they did, in the attempt to accomplish that object, has already been stated, and it need not be repeated; nor is it necessary to restate the consequences which followed from what they did in their endeavors to transport the ferry-boat to the designated place, as it already appears that all their endeavors failed for the reason that the flames burst out through the decks, as those in charge of the steamer anticipated they would do, and finally extended to the part of the ferry-boat to which the hempen hawser was fastened and burnt it off when, as a matter of course, the burning ferry-boat went adrift.

Plenary evidence is exhibited that all the parties present on the occasion expected that the flames would presently burst through the decks of the ferry-boat at the time the steam tug made fast to her in order to drag her from the slip where she lay, and to move the vessel into the stream; and both parties agree that it was in view of that expectation that the decision was made to move the ferry-boat from her resting place, nor is it questioned by either party that if those in charge of the steam tug had used a chain instead of a manilla hawser the object contemplated might have been safely and successfully carried into effect.

Even ordinary experience and prudence would have suggested that the part of the hawser made fast to the burning ferry-boat should be chain, and that it would be unsafe to use a hawser made of manilla. Where the danger is great the greater should be the precaution, as prudent men in great emergencies employ their best exertions to ward off the danger. Whether they had a chain hawser on board or not does not appear, but sufficient does appear to satisfy the court that one of sufficient length to have prevented the disaster might easily have been procured, even if they were not supplied with such an appliance.

All of these matters were fully considered by the district judge, and he decided the following propositions: (1) That the attempt to tow the burning ferry-boat out into the stream by a hempen hawser was an act of negligence. (2) That the drifting of the ferry-boat was not an inevitable accident, but was the result of negligence on the part of those in charge of the steam tug. (3) That the schooner, not being required by law to keep a watch under the circumstances, was without fault and is entitled to damages.

Exactly the same conclusions were reached by the circuit court. And in those conclusions the court here concurs.

Decree affirmed.

Cited—2 Flap., 161; 5 Hughes, 123.

NEW YORK HARBOR PROTECTION COMPANY, Appt.,

v.

THE SCHOONER CLARA, HER TACKLE, ETC., AUGUSTUS M. COX ET AL., Claimants.

(See S. C., "*The Clarita and The Clara*," 23 Wall. 1-19.)

Salvage—services rendered in time of peril caused by claimant—not allowed.

1. The elements necessary to constitute a valid salvage claim are: a marine peril to the property to be rescued, voluntary service not owed to the property as matter of duty, and success in saving the property or some portion of it from impending peril.

2. Where two vessels come in collision, if one is not disabled, she is bound to render all possible assistance to the other, even though the other may be wholly in fault.

3. Services of the kind, when required by duty, do not constitute a claim for salvage, and salvors are not entitled to reward for saving property which they had by their own wrongful acts, contributed to place in jeopardy.

[No. 229.]

Argued Apr. 22, 1875. Decided May 3, 1875.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Reference is made to the opinion of the court in the preceding cause as well as in this for a statement of the facts. The two cases were argued at the same time by the same counsel. See argument in that cause, *ante*, 146.

The case is stated by the court.

Mr. Justice Clifford delivered the opinion of the court:

Remuneration is claimed by the libelants in this case, as the owners of the steam tug

[Clarita] adjudged guilty of negligence in the case just decided [*ante*, 146], for salvage service rendered by the same steam tug and the officers and crew in charge of her, in subduing the fire on board the schooner and in saving the vessel from destruction.

Enough appears in the opinion delivered in that case to show that the schooner caught fire from the ferry-boat which was taken in tow by the steam tug, and that the collision between the two vessels was caused by the want of proper precaution, care and skill on the part of those intrusted with the control and management of the steam tug. Sufficient account of what occurred prior to the collision, and to the time the schooner caught fire from the burning of the ferry-boat is given in the other case, and need not be repeated.

Three attempts, it will be remembered, were made, without success, to tow the burning ferry-boat up the river by means of a hempen hawser, before the schooner caught fire, and that the burning ferry-boat was, by the force of the wind and the flood-tide, floated against the schooner and set her upper works on fire. Both the ferry-boat and the schooner being on fire, those in charge of the steam tug made another attempt to accomplish what they originally intended, and the pleadings and evidence show that they fastened the hawser to the ferry-boat and succeeded in dragging her clear of the schooner; and it also appears that she immediately sunk and became a total loss.

All necessity for service in that behalf being ended, the allegation is, that those in charge of the steam tug immediately turned their attention to the schooner, which was then burning fiercely from her foremast to her bowsprit and including all her head sails; and the libelants claim that the officers and crew of the steam tug made fast to the schooner by a line, and that they passed a hose on board the burning vessel and brought two or more powerful streams of water to bear upon the flames; and that they, by their exertions, which continued for two or three hours, succeeded in subduing the flames, and in preserving the schooner from entire destruction.

Service was made and the owners of the schooner appeared as claimants and filed an answer.

They admit that the steam tug ultimately succeeded in dragging the ferry-boat clear of the schooner, and that she returned to the schooner after the ferry-boat sunk, and that she rendered service in subduing the flames and saving the schooner from complete destruction; but they deny, in the most positive form, that the libelants are entitled to salvage or to any compensation by the way of salvage on account of the services rendered, for the following reasons: (1) Because the schooner would not have caught fire if those in charge of the steam tug had exercised due and proper care in their attempts to tow the burning ferry-boat from her slip, up the river. (2) Because the schooner was run into and set on fire by the carelessness, negligence and inattention of those who rendered the alleged salvage service, and not from any accident, nor from any fault or neglect of duty on the part of the schooner.

Further discussion of the matters of fact involved in those propositions is unnecessary, as

they have all been conclusively determined in favor of the present respondents in the preceding case, which leaves nothing for decision in the case before the court, except the question whether the claim for salvage compensation can be sustained in view of the facts set forth in the propositions submitted by the respondents.

Salvage is well defined as the compensation allowed to persons by whose assistance a ship or vessel, or the cargo of the same, or the lives of the persons belonging to the ship or vessel, are saved from danger or loss in cases of shipwreck, derelict capture, or other marine misadventures. *Maude & P. Ship.*, 477.

Other jurists define it as the service which volunteer adventurers spontaneously render to the owners, in the recovery of property from loss or damage at sea under the responsibility of making restitution and with a lien for their reward. *Machl. Ship.*, 523; *The Neptune*, 1 Hagg. Adm., 236; *The Thetis*, 8 Hagg. Adm., 84.

Persons who render such service are called salvors, and a salvor is defined to be a person who, without any particular relation to the ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing contract that connected him with the duty of employing himself for the preservation of the vessel.

Enough appears in those definitions to show that the elements necessary to constitute a valid salvage claim are as follows: (1) A marine peril to the property to be rescued. (2) Voluntary service not owed to the property as matter of duty. Success in saving the property or some portion of it from the impending peril.

Public policy encourages the hardy and industrious mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to dishonesty, the law allows him, in case he is successful, a liberal compensation. Those liberal rules as to remuneration were adopted and are administered, not only as an inducement to the daring to embark in such enterprises, but to withdraw from the salvors as far as possible every motive to depredate upon the property of the unfortunate owner. *Cromwell v. The Island City*, 1 Cliff., 228.

Such compensation, however, is not claimable in every case in which work and labor are done for the preservation of a ship and cargo. Suitors, in order to support such a claim, must be prepared to show that the property was exposed to peril and that the undertaking involved risk and enterprise, and that they were successful in securing the property and saving it to the owner, and that the service was voluntary and that it was not rendered in pursuance of any duty owed to the owner or to the property. Conditions of the kind are inherent in the very nature of the undertaking, and salvors, in consideration of the large reward allowed to them for their services, are required to be vigilant in preventing, detecting and exposing every act of plunder upon the property saved, for the reason that the right to salvage compensation presupposes good faith, meritorious service, complete restoration and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors.

Seamen belonging to the ship in peril cannot, as a general rule, claim a salvage compensation, not only because it is their duty to save both ship and cargo, if it is in their power, but because it would be unwise to tempt them to let the ship and cargo get into a position of danger in order that by extreme exertion they might claim salvage compensation. *Miller v. Kelly*, Abb. Adm., 564; *The Perkins*, 21 L. Rep., 87; *The Speedwell*, 21 L. Rep., 99.

Pilots, also, are excluded from such compensation for any exertions or services rendered while acting within the line of their duty; but like other persons they may become salvors in legal contemplation, if they perform extraordinary services outside of the line of their duty. *The Jonge Andries*, 1 Swab., 226; *S. C.*, 11 Moore, P. C., 318.

Neither can passengers claim salvage unless they perform extraordinary service. *The Branstons*, 2 Hagg. Adm., 8, n.; *The Vrede*, Lush. Adm., 822; *The Two Friends*, 1 C. Rob., 285; *Maude & P., Ship.*, 485; 2 Pars. Ship., 268.

Persons otherwise entitled as salvors cannot be defeated in making their claim because the vessel was fraudulently imperiled by the master, unless it appears that they were parties to the fraud or were cognizant of it while it was going on and did not interfere to prevent it as far as they could; or unless they endeavored to conceal the master's misconduct and screen him from detection. *Brevoort v. The Fair American*, 1 Pet. Adm., 95; Pars. Ship., 285.

Where two vessels come in collision, if one is not disabled she is bound to render all possible assistance to the other, even though the other may be wholly in fault. *The Celt*, 8 Hagg. Adm., 828; *The Ericsson*, Swab., 88; *The Despatch*, Swab., 140; 1 Pars. Ship., 529.

Authorities to support that proposition are quite numerous, and it is very clear that if the vessel in fault renders assistance to the one not in fault, the former cannot make any claim for salvage either from the other vessel or the cargo on board, as it is her duty to render every assistance in her power. *The Iola*, 4 Blatchf., 31; 2 Pars. Ship., 289.

Services of the kind, when required by duty, do not constitute a claim for salvage, and it is expressly decided that salvors are not entitled to reward for saving property which they had by their own wrongful acts contributed to place in jeopardy, and the court here fully concurs in that proposition. *The Capella*, L. R., 1 Adm. & Eccl., 856; *The Queen*, L. R., 2 Adm. & Eccl., 55.

Text writers, also, of high repute, adopt the rule that "Persons who have contributed to place property in danger cannot be allowed to claim reward for rescuing it from the consequences of their own wrongful acts," which is a principle applicable in all respects to the case before the court. *Williams & B. Pr.*, 128; *Benedict Adm.*, 2d ed., 180.

Cases may be found in which it is held that when one ship has rendered assistance to another ship belonging to the same owner, that the ship rendering such assistance cannot claim a salvage reward; but the better opinion is that the rule laid down in those cases admits of exceptions, as where the services rendered were of an extraordinary character and were entirely outside of the contract duties of those by whom

they were rendered. *The Sappho*, L. R., 8 P. C. App., 690; *S. C.*, 8 Moore, P. C. (N. S.), 70.

Exceptions also exist to the rule that a steam tug engaged in towing may not, in case she performs extraordinary services outside of her contract, be entitled to salvage compensation, if it appears that the services were meritorious and saved the property from an impending peril which supervened subsequent to the original undertaking. *The I. C. Potter*, L. R., 3 Adm. & Eccl., 296; *The Minnehaha*, 1 Lush. Adm., 385; *S. C.*, 15 Moore, P. C., 138; *Maude & P., Ship.*, 479.

None of these exceptional cases, however, can benefit the libelants in this case, for the reason that the insuperable objection to their right of recovery is, that the peril to which the schooner was exposed was caused by those who rendered the alleged salvage service; and to the rule that such libelants are not entitled to recover there are no exceptions, when it appears that the suit is prosecuted in behalf of the wrong-doers.

Decree affirmed.

Cited—2 Flipp., 161; 5 Hughes, 123.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Plff. in Err.*,

v.

JAMES YOUNG, Admr. of McPHERSON YOUNG, Deceased.

(See S. C., "*Ins. Co. v. Young's Admr.*," 23 Wall., 85-108.)

Contract of insurance—mutual assent.

1. Where one made application for a life insurance, gave his note for the premium and took a receipt from the Company's agent, giving the Company the right to accept or reject the application, and the Company did not agree to its terms, but issued a policy with different terms and transmitted the same to the agent, but before delivery the applicant died, his note being unpaid; held, that there was no contract of insurance.

2. The applicant assented to the proposition contained in the receipt, but the Company did not. The Company assented to the policy, but the applicant never did. The mutual assent, the meeting of the minds of both parties, was wanting. Such assent is vital to the existence of a contract. Without it there is none, and there can be none.

[No. 203.]

Argued Apr. 16, 19, 1875. Decided May 3, 1875.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Mr. W. D. Davidge, for plaintiff in error:

The finding does not show any liability on the part of the plaintiff in error.

If the acceptance of the application and transmission of the policy be taken together, they show, as was doubtless the case, a qualified acceptance of the proposal to insure.

The only overt act found is the transmission of the policy; and the acceptance of a proposal consists in some overt act intended to signify to the other party such acceptance. The overt act may be by word spoken, or mailing a let-

NOTE.—Effect of delivery of life insurance policy before payment of first premium, contrary to its conditions. See note to *Brooklyn Life Ins. Co. v. Miller*, U. S., XX., 398.

ter or otherwise; but, whatever the form, until such act there is no *aggregatio mentium*.

May, Ins., 55; *Taylor v. Ins. Co.*, 9 How., 890; *Hallock v. Ins. Co.*, 2 Dutch., 268; *Heiman v. Ins. Co.*, 17 Minn., 158.

The policy differed from the application in respect to date and amount of premium, and the time for making payment of premium. The policy was not then an unqualified assent to the terms of the application. The minds of the parties did not meet, and there was no contract, and indeed none is found. McPherson Young was certainly not bound to accept the policy. The Company could not, after tender of it, have maintained an action to recover the amount of the note; but he had a complete defense, in the fact that the policy differed substantially from the application, and the magnitude and effect of that difference were matters for him to decide.

Eliason v. Henshaw, 4 Wheat., 225.

If he was not bound neither was the Company.

If the acceptance be found dislocated from the overt act, without which, in some shape, there can be no assent to a proposal, how then stands the case?

The terms of the application are not found. It is only by inference that the conclusion is reached that they were the terms mentioned in the receipt. But the case is that of a special verdict, and in a special verdict the court can intend nothing.

Burr v. R. R. & Nav. Co., 1 Wall., 99 [68 U. S., XVII., 561]; *Norris v. Jackson*, 9 Wall., 125 (76 U. S., XIX., 608); 10 Co., 57; *Seward v. Jackson*, 8 Cow., 406; *Hill v. Covell*, 1 N. Y., 522; *Langley v. Warner*, 3 N. Y., 827.

It is the province of the jury, or the court discharging the office of jury, to draw inferences. Neither the court below as a tribunal of law, nor this court can draw them. But if this objection be waived, it is apparent that the subject-matter of the application was a policy of insurance, and the law would presume a policy on the usual conditions. But what were these conditions? The finding is silent. That there were conditions is admitted by the declaration.

Barto v. Himrod, 8 N. Y. (4 Seld.), 483.

Messrs. Henry Beard and W. T. Otto, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of California.

The case was submitted to the court without the intervention of a jury. The court found the facts and gave judgment for the plaintiff. The defendant sued out this writ of error. The question presented for our determination is, whether the finding warrants the judgment. The facts found lie within a narrow compass.

On the 5th of June, 1867, McPherson Young applied to the agent of the plaintiff in error in San Francisco for insurance upon his life, and thereupon received from the agent a receipt which is as follows:

"Amount, \$99.80. Insurance, \$5,000.
The Mutual Life Insurance Company of
New York.

H. S. Homans, General Agent, 424 Montgomery Street, San Francisco.

Received, San Francisco, June 5th, 1867, from McP. Young of San Francisco, Cal., ninety nine $\frac{80}{100}$ dollars, being the first $\frac{1}{4}$ annual premium on his application for a policy of insurance of the Mutual Life Insurance Company of New York, for the sum of five thousand (\$5,000) dollars on the life of McP. Young, payable at 45 or death, and premiums paid up in full in 10 y'rs; said policy of insurance to take effect and be in force from and after the date hereof, provided that said application shall be accepted by the said Company; but should the same be declined or rejected by said Company, then the full amount hereby paid will be returned to said applicant upon the production of this receipt.

For the Mutual Life Insurance Company.

H. S. HOMANS,

General Agent for the Pacific Coast."

The plaintiff in error is a Corporation of the City of New York, but had a general agent at San Francisco and an office there for the transaction of its business.

The application of Young was received by the Company at New York, and was answered by a policy transmitted to the agent, at San Francisco. The policy bore date on the 5th of April, 1867, and varied from the terms specified in the receipt in the following particulars: 1. It took effect from the 5th of April, instead of the 5th of June. The loss to the applicant by this change is obvious and needs no comment. 2. The quarterly payments were to be \$96.60 instead of \$99.80. 3. The days of payment during the ten years were to be the 5th days of April, July, October and January, instead of the 5th days of June, September, December and March. It contained a provision that "If the said premiums shall not be paid on or before the days above mentioned for the payment thereof," then in every such case the Company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and determine."

The policy was received by the agent at San Francisco on the 2d of August, 1867.

With the policy were received two receipts to be signed by the Secretary of the Company, and to be countersigned by the agent before delivery. One of them was for the payment of the installment due on the 6th of April, 1867, and the other for the installment due on the 6th of July in that year.

On the 8th of August, 1867, the agent addressed a note to Young at Vallejo, notifying him that the policy had arrived, and requesting to be advised whether it should be forwarded to Vallejo or be held until he should call for it in San Francisco. It does not appear in the case when or how this note was forwarded, nor whether Young ever received it. Notice of the receipt of the application by the Company, or of the receipt of the policy by the agent, was not shown to have been given to or received by him. No demand was made upon him for any further payment, and no receipt requiring such payment was presented to him.

Young was shot and mortally wounded at Vallejo on the 21st of August, 1867. He was removed the next day to a hospital in San Fran-

cisco where he died on the 20th of September, following. From the time he was shot until his death he was unable to leave his bed, and was incompetent mentally and physically to attend to any business.

The communication at that time from San Francisco to New York was by ocean steamers to Panama, thence by rail to Aspinwall, and thence by steamers to New York. The time consumed in the transit was from twenty-three to thirty days.

After the death of Young the agent wrote on the policy "cancel—dead," and sent it to the office in New York. The officers there on the 21st of October, 1867, canceled it by tearing off the seal of the Company and the signature of the president.

The agent countersigned the receipt and applied and canceled the proper stamps. They remain in the hands of the Company attached to the policy uncanceled. The sum of \$99.30 mentioned in the receipt of June 5th, 1867, was not paid. Young gave his note for that amount payable to the agent individually at sixty days. Nothing was paid upon it. It remained in the possession of the defendant. The word "canceled," was written upon it, but by whom did not appear. Young never paid anything on account of the contract claimed to have been made.

On the 24th of August, 1871, letters of administration upon the estate of Young were issued to the defendant in error. He qualified under them according to law. Shortly afterwards notice of the death of the intestate was given and payment of the insurance money demanded. Payment was refused on the ground that the Company was not liable.

Several objections, some of them technical, have been taken by the counsel for the plaintiff in error, to the judgment rendered. We shall confine our remarks to one of them. It is fundamental, and goes to the right, justice and law of the case. The receipt of the 5th of June was the initial step of the parties. It reserved the absolute right to the Company to accept or reject the proposition which it contained. There was a necessary implication that, if it were accepted, the response and acceptance were to be by a policy, in conformity with the terms specified in the receipt as far as they extended, and beyond that, in the usual form of such instruments as issued by the Company. But it was clearly within the power of the Company, under the condition expressed, wholly to reject the application, without giving any reason; or to accept the proposition with such modifications of the terms specified, and of the usual conditions of such policies as it might see fit to prescribe. The entire subject was both affirmatively and negatively within its choice and discretion. The acceptance was a qualified one, and there was none other.

It was by a policy departing from the terms specified in the receipt in the particulars before mentioned, but containing as to the conditions imposed otherwise, nothing beyond what was usual in such cases. At this stage of the business, the Company was not bound according to the receipt, because it had not agreed to a part of the terms specified, and those terms were material and of the essence of the proposition. Clearly the Company never did agree to those terms. What it would have done if the appli-

cant had refused, as he might have done, to take the policy it is not material to consider. It is enough that the Company did not so agree.

This court has no power to make such an agreement for it. The indispensable element of the consent of one of the parties is shown not to have existed. The contrary appears by the policy transmitted to the agent. The consent of the applicant appears, but that alone is unavailing. That fact, in any sound legal view of the case, is as if it were not. In the analysis of the case the receipt, for the reasons stated, must be laid out of view.

This brings us to the examination of the controversy as respects the policy of insurance. Here the position of the parties is reversed. The applicant assented to the proposition contained in the receipt, but the Company did not. The Company assented to the policy, but the applicant never did. The mutual assent, the meeting of the minds of both parties, is wanting. Such assent is vital to the existence of a contract. Without it there is none, and there can be none. In this case it is not established by any direct proof, and there is none from which it can be inferred. This is not controverted. If it be alleged there was fault on the part of the agent, for which the Company is responsible, in not communicating promptly and fully with the applicant upon the arrival of the policy, there are several answers to the imputation. Such fault, viewed in any light, cannot be taken as the legal equivalent of the assent of the applicant to the terms of the policy. But no such fault is shown. The applicant knew that the Company was not bound and would not be bound until it chose to become so, and that it had the right to do what it did. It was his duty to keep up the necessary communication with the agent by calling upon him when the answer from the office in New York might have been expected to arrive, and if he intended to be absent, by giving the agent his address during his absence, and taking from him a promise to communicate the result as soon as the reply was received.

It does not appear that he took any step whatever in this way. Neither he nor his personal representative, therefore, had any reason to complain. If he had received notice of the proposition made through the policy it would have been at his option to give or refuse his assent. He was certainly in no wise bound until such assent was given. Until then, there could be no contract on his part, and if there was none on his part, there could be none on the part of the Company. The obligation in such cases is correlative. If there is none on one side there is none on the other. The requisite assent must be the work of the parties themselves. The law cannot supply it for them. That is a function wholly beyond the sphere of judicial authority. As the applicant was never bound, the Company was never bound. The policy was, therefore, no more a contract than the receipt. Both had the same fatal defect, the want of the assent of one of the parties.

Even where the parties supposed they had agreed and it turned out there was a misunderstanding as to a material point, the requisite mutual assent as to that point being wanting, it was held that neither was bound. *Baldwin v. Mildeberger*, 2 Hall, 176; *Coles v.*

Browne, 10 Paige, 526; one of these cases was in law and the other in equity; see, also, *Calverley v. Williams*, 1 Ves., Jr., 210, and *Crane v. Portland*, 9 Mich., 493.

The deceased paid nothing. The contest is an effort on that side to gather where he had not sown. The law involved is expressed by the phrase "it takes two to make a bargain."

In this view of the case, irrespective of the other considerations which have been urged upon our attention, we hold that the facts found do not warrant the conclusion reached.

The judgment is, therefore, reversed and the case will be remanded to the Circuit Court, with directions to enter a judgment in favor of the plaintiff in error.

Cited—102 U. S., 112; 4 Cliff., 611.

HARVEY SANDUSKY, Appt.,
v.
THE FIRST NATIONAL BANK OF INDIANAPOLIS.

(See S. C., 23 Wall., 289-298.)

Appeal in bankruptcy cases—when not allowable—supervisory jurisdiction.

1. To authorize an appeal to this court from the judgment or decree of a circuit court reviewing the action of a district court under its bankruptcy jurisdiction, the case must be one in equity arising under or authorized by the Bankrupt Act.

2. Where one who had been adjudged a bankrupt desired to have that adjudication set aside and filed his petition in the district court for that purpose in the original cause, it was not a bill in equity to impeach the adjudication for fraud.

3. It became part of the proceedings in bankruptcy, from which it cannot be separated. No appeal could be taken from the whole proceeding and, consequently, none can be taken from this as one of its parts.

4. The only remedy for the correction of errors in such cases, is in the supervisory jurisdiction of the circuit courts under the 1st clause of the 2d section of the Bankrupt Act. From the decisions of the circuit court in the exercise of that jurisdiction, no appeal lies to this court.

[No. 724.]

Submitted Apr. 12, 1875. Decided May 3, 1875.

A PPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The case is stated by the court.

Mr. W. T. Otto, for the appellee.

Messrs. J. Harper and J. M. Palmer, for appellant.

Mr. Chief Justice Waite delivered the opinion of the court:

On the 25th of August, 1871, the First National Bank of Indianapolis filed a petition in the District Court of the United States for the Southern District of Illinois, to have Harvey Sandusky adjudged a bankrupt. Sandusky appeared on the 5th September, and denying the allegations against him in the petition, demanded a trial by jury. This demand was afterwards withdrawn by his attorneys, and on the 20th January, 1872, he was in due form adjudged a bankrupt in the court. Afterwards an assignee was chosen and qualified, who proceeded with the settlement of the estate.

See 23 WALL.

On the 9th December, 1873, Sandusky served upon the Bank a notice as follows:

"IN THE MATTER OF THE
PETITION OF THE FIRST NA-
TIONAL BANK OF SANDUSKY } In Bankruptcy.
v.

HARVEY SANDUSKY.

To the First National Bank of Indianapolis, and Messrs. Stuart, Edwards & Brown, its attorneys:

You are hereby notified that, on the 10th day of December, 1873, at 10 o'clock A. M., before the Honorable Samuel H. Treat, Judge of said County at Chambers, the said Harvey Sandusky will move the court for leave to file his petition in the above entitled cause for a review of the proceedings in said cause, and to vacate the decree of bankruptcy therein, and for other relief; which petition the said Harvey Sandusky has this day placed in the hands and in the office of the clerk of said court for your examination.

HARVEY SANDUSKY.

By HUFF & LANGDON and
BRACKETT & REILY,
His attorneys."

On the 10th December, the following entry was made in the cause:

Wednesday, December, 10th, 1873.

Before the Honorable Samuel H. Treat, Judge in bankruptcy.

In the matter of Harvey Sandusky, bankrupt. And now on this day came Harvey Sandusky, by his counsel Huff & Langdon and Brackett & Reiley, and the petitioning creditor, the First National Bank of Indianapolis, and Joseph G. English, the assignee, by Stuart, Edwards & Brown, their counsel, and on motion of Sandusky leave is given him to file his petition herein, which is accordingly done. And on his further motion it is ordered by the court, that the said First National Bank of Indianapolis and Joseph G. English file their answers to said petition on or before the first Monday of January next."

The petition was addressed to the court in bankruptcy sitting and prayed "for a review of the record of the said proceedings in bankruptcy; that the decree declaring your petitioner a bankrupt be set aside and vacated and the amended and original petition of the said Bank be dismissed, and that your petitioner's estate be restored to him; and for such other and further relief in the premises as may be equitable and just."

No defendants were named in the petition, and there was no prayer for process. An answer was filed by the Bank, and also by George W. Parker, who acted as the agent of the Bank in the original proceedings. The assignee did not answer. Testimony was taken, and on the 12th of June, 1874, after full hearing, the petition was dismissed. Sandusky then prayed an appeal to the Circuit Court which was allowed, and, on 25th of June that court affirmed the judgment of the District Court. He then appealed to this court. A motion is now made to dismiss this appeal for want of jurisdiction.

To authorize an appeal to this court from the judgment or decree of a Circuit Court reviewing the action of a District Court under its bankruptcy jurisdiction, the case must be one in which an appeal may be taken from the Dis-

strict to the Circuit Court; that is to say, it must be a case in equity arising under or authorized by the Bankrupt Act. R. S., sec. 4980.

In our opinion this is not such a case. A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation.

Applications for such re-examination may be made by motion or petition, according to the circumstances of the case. Such a motion or petition will not have the effect of a new suit, but of a proceeding in the old one.

In this case Sandusky had been adjudged a bankrupt in a suit to which he was a party. He desired to have that adjudication set aside, and accordingly filed his petition in the District Court for that purpose. This petition was filed in the original cause. It was in no sense whatever a bill in equity to impeach the adjudication for fraud. It had none of the forms of such a bill. On the contrary, it had all the forms of a petition for a rehearing in the original suit, and at the express request of Sandusky was filed as a petition in that suit. It thus became part of the proceedings in bankruptcy, from which it cannot be separated. No appeal could be taken from the whole proceeding and, consequently, none can be taken from this as one of its parts. The only remedy provided for the correction of errors in such cases is to be found in the supervisory jurisdiction of the circuit courts under the provisions of the 1st clause of the 2d section of the Bankrupt Act. R. S., sec. 4976. From the decisions of the Circuit Court in the exercise of that jurisdiction no appeal lies to this court. It has been many times so decided. *Morgan v. Thornhill*, 11 Wall., 65 [78 U. S., XX., 60]; *Hall v. Allen*, 12 Wall., 454 [79 U. S., XX., 458]; *Mead v. Thompson*, 15 Wall., 638 [82 U. S., XXI., 243]; *Marshall v. Knox*, 16 Wall., 555 [83 U. S., XXI., 483]; *Coit v. Robinson*, 19 Wall., 285 [86 U. S., XXII., 154]; *Stickney v. Wilt*, not yet reported [*ante*, 50].

The appeal is dismissed.

Cited—93 U. S., 248; 94 U. S., 322, 324, 443; 98 U. S., 369; 15 Bk. Reg., 422, 541; 4 Dill., 98; 1 Hughes, 650.

ANN GREGORY, *Plff. in Err.*,

v.

WM. N. McVEIGH.

(See S. C., 23 Wall., 294-307.)

Decision of what State Courts reviewable in this court—highest State Court.

1. A final judgment or decree in any suit, in the highest court of a State in which a decision in the

suit could be had, may, in a proper case, be re-examined in this court.

2. If the suit is one of which the highest State Court cannot take jurisdiction, this court may re-examine the judgment of the highest court which, under laws of the State, could decide it.

3. If a cause cannot be taken to the highest court of a State, except by leave of the court or a judge thereof, a refusal to grant the leave makes the judgment such a final judgment as may be reviewed by this court.

[No. 633.]

Submitted Apr. 9, 1875. Decided May 3, 1875.

IN ERROR to the Corporation Court of the City of Alexandria, State of Virginia.

On motion to dismiss.

The case is sufficiently stated by the court. See, also, the decision of the case on the merits, 93 U. S., 284, *post*, and *Windsor v. McVeigh*, 93 U. S., 284, *post*.

Messrs. John Howard and P. Phillips, for defendant in error:

No federal question was raised for adjudication, or was adjudicated by the State Court and, therefore, no such question is presented for the decision of this court.

The validity of no treaty or statute is here involved and, therefore, in order to maintain the jurisdiction of the court, the plaintiff in error must claim by virtue of an authority exercised under the United States, and show that the decision of the State Court was against the validity of that authority. It is not sufficient for him to make a mere assertion of an exercise of authority under the United States as a foundation of his title. He must show that such authority was actually exercised, and exercised in a manner valid and binding upon the party, to whose property he claims title, according to the established and recognized principles of jurisprudence.

Millingar v. Hartupsee, 6 Wall., 261, 262 (73 U. S., XVIII., 830).

The right is claimed under an alleged judgment of the District Court of the United States for the Eastern District of Virginia; and if, on looking into the record, it appears that no such judgment existed or was in force, it cannot be insisted that this court can review the decision of the State Court that the right claimed did not exist. We contend that there was no judgment divesting the title of McVeigh and vesting it in the United States; that the so-called sentence and decree of condemnation and sale was an absolute nullity upon its face; not merely voidable but wholly void; and that in this case it should be treated as if said alleged judgment had never been passed, even though it is attacked in a collateral proceeding.

Should the court (if possible) not concur in the result of the foregoing views, then we ask that the writs may be dismissed, because they were directed to the Corporation Court of Alexandria, instead of the Supreme Court of Appeals of Virginia.

The law is, that the writ should be directed to the highest court of law or equity in the State

NOTE.—What is "final decree" or judgment of state or other court from which appeal lies. See note to *Gibbons v. Ogden*, 19 U. S. (6 Wheat.), 448.

Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S. See note to *Matthews v. Zane*, 8 U. S. (4 Cranch), 382; note to *Martin v. Hunter*, 14 U. S. (1 Wheat.), 304; and note to *Williams v. Norris*, 25 U. S. (12 Wheat.), 117.

in which a decision in the case could be had. In these cases the judgments were rendered by the Corporation Court of Alexandria. By the law of Virginia, there might have been writs of error and *supersedeas* from the Supreme Court of the State to that court, and such a writ was actually issued by the Court of Appeals in a similar case of *Underwood v. McVeigh* (No. 504 Oct. Term, 1873, reported in Law ed., 85 U. S., XXI., 952); which case finally went to this court, and was dismissed as above shown, because the writ of error from this court was directed, not to the Court of Appeals but to the Corporation Court. The Court of Appeals, therefore, was the highest court of law and equity in the State in which a decision upon the cases could have been had. That court has never acted upon any writ of error in either of the cases. It is true that petitions for writs, addressed to the court, were refused by the several judges of the court in vacation. They had no jurisdiction to grant the writs, as a court, at the time and place when as individual judges acting out of court in vacation they refused the writs.

Certainly there is no statute conferring such authority. It was in fact a mere nullity, except as an evidence of the refusal of the writs by the several judges acting in vacation. The clerk of the Corporation Court had no authority to enter the order. When entered it was not the judgment of the Corporation Court, nor the judgment of the Supreme Court of Appeals of Virginia sitting within the Richmond District having jurisdiction to render any judgment in the premises. It was as much the judgment of the clerk as it was that of the court.

The highest court of the State has never passed any judgment upon the alleged federal question in the cases now before the court and, therefore, this court has no jurisdiction to revise judgments of the Supreme Court of Appeals of Virginia which were never rendered.

Let it be conceded, however, that the foregoing views are erroneous. Upon that hypothesis, the writs of error from the Supreme Court of the United States should have been directed to the Supreme Court of Appeals of Virginia. The familiar practice of this court is to direct its writs to the Supreme Court of this State, as in *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How., 71; *Paul v. Virginia*, 8 Wall., 178 (75 U. S. XIX., 359); and *Underwood v. McVeigh* (*supra*), which last case is directly in point.

Another and final view is this: either the Supreme Court of Virginia has acted on the judgment of the Corporation Court of Alexandria, or it has not. If it has, then the writ of this Court should have been directed to that court. If it has not, then as that court was the highest court in the State, having jurisdiction, and that court having never exercised jurisdiction, of course this court has no jurisdiction to revise a jurisdiction which has never been exercised.

Mr. S. F. Beach, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The motion to dismiss this cause for want of jurisdiction is denied.

"A final judgment or decree in any suit, in the highest court of a State in which a decision in the suit could be had," may in a proper case

be re-examined in this court. R. S., sec. 709.

The Court of Appeals is the highest court in the State of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and then can only examine the judgment of that court. If, however, the suit is one of which that court cannot take jurisdiction, we may re-examine the judgment of the highest court which, under laws of the State, could decide it. *Downham v. Alexandria*, 9 Wall., 659 [76 U. S., XIX., 807].

The Court of Appeals has revisory jurisdiction over the judgments of the Corporation Court of the City of Alexandria, but parties are not permitted, in the class of cases to which this belongs, to take such judgments there for review as a matter of right. Leave for that purpose must first be obtained. Two modes of obtaining this leave are provided; one by petition to the Court of Appeals itself, and the other by petition to a judge thereof. If the petition is presented to a judge and he denies it generally, without more, it may be again presented to the court. But if the judge to whom the application is made "shall deem the judgment, etc., plainly right," and reject it on that ground, if the order of rejection shall so state, no other petition shall afterwards be presented to the same purpose. Code, Va., 1873, ch. 178, sec. 10. The parties are left free to present their petitions to the court or to a judge thereof, as they may find it most convenient or desirable.

It has long been settled that if a cause cannot be taken to the highest court of a State, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court. *R. R. Co. v. R. R. Co.*, 13 How., 80.

In the present case the Court of Appeals has now no power to review the judgment of the court below. It cannot even entertain a motion for leave to proceed. A judgment has been rendered by the highest court of the State in which a decision can be had. The Court of Appeals has never, in fact, had jurisdiction. A suit cannot be taken there, except upon leave, and that leave has, in the regular order of proceeding, been refused in this case. From this refusal there can be no appeal. Everything has been done that can be to effect the transfer of the cause. The rejection of a petition by one judge does not prevent its presentation to another. Here the petition has been presented to each and every one of the judges, and they have all rejected it because the judgment was "plainly right." Thus the doors of the Court of Appeals have been forever closed against the suit; not through neglect, but in the regular order of proceeding under the law governing the practice.

We think, therefore, that the judgment of the Corporation Court of the City of Alexandria is the judgment of the highest court of the State in which a decision of the suit could be had, and that we may re-examine it upon error.

Without stopping to discuss the other question presented by the motion, it is sufficient to say that we think the case involves the consid-

eration of a federal question. The proceeding in the district court was under the authority of the United States, and its validity is drawn in question.

RICHARD WINDSOR }
v. } [No. 583.]
WILLIAM N. McVEIGH.

Error to the Corporation Court of the City of Alexandria.

The motion to dismiss this writ of error was submitted with a similar motion in *Gregory v. McVeigh*, just decided [*ante*, 156]. In the argument, counsel on both sides have treated the two cases as though they were in all respects identical.

We, therefore, deny the motion, for the reasons assigned in the other case.

Cited—93 U. S., 875.

THE STEAMER RIO GRANDE, HER
TACKLE, ETC., THE OCEAN TOW-BOAT
COMPANY, Claimant, Appt.,

v.
WILLIAM OTIS ET AL.

(See S. C., "*The Rio Grande*," 23 Wall., 458-466.)

Appeal, effect of, on the property—removal of—when does not destroy jurisdiction—conclusive decree of another court.

1. Where an appeal to the Circuit Court was taken from a decree of the District Court, dismissing a libel against a vessel for repairs, a few moments after the decree was made, and bonds to stay proceedings were given within the time required by statute, the appeal stayed all proceedings, and the parties were bound to keep the vessel where it then was, to wit: in the possession of the court.

2. The removal of the vessel, pending such appeal to the Circuit Court, was illegal.

3. A valid seizure and actual control of the res by the marshal gives jurisdiction of the subject-matter, and an accidental or fraudulent or improper removal of it from his custody, or a delivery to the party upon security, does not destroy jurisdiction.

4. In the present case, the order for restoration was in direct violation of the statute regarding appeals, and did not operate to destroy the jurisdiction of the Circuit Court.

5. Where the question, whether the vessel was foreign or domestic, was one of the questions presented to the Circuit Court and passed upon by it, its decree is conclusive.

6. The judgment and decree of the Circuit Court in Alabama, that the vessel was subject to the lien of the libellant's claim, remaining in full force, was conclusive of the right of such claim when alleged in the District Court of Louisiana.

[No. 231.]

Argued Apr. 22, 1875. Decided May 3, 1875.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

In the year 1867 several libels were filed by material men in the District Court of the United States for the District of Alabama, against the Steamer Rio Grande. The Rio Grande was duly seized by the marshal for that district. May 11, 1868, the court rendered a decree dismissing the libels. Immediately thereafter the counsel for the libelants asked an appeal to the Circuit Court, which was granted. During the next few days and within the proper time, bonds

were filed by the several libelants, appellants, approved, and appeal duly effected. May 12, 1868, on motion of complainants, the vessel was ordered to be delivered by the marshal to William Stewart and William Ross, "Trustees of the mortgagees, who are entitled to the possession of the same."

Jan. 11, 1871, the Circuit Court rendered a decree reversing the decree of the District Court, and declaring that the claims set up in the several libels were liens on the steamer.

June 8, 1871, the parties in whose favor this decree had been entered by the Circuit Court for the District of Alabama, filed their libel in the District Court for Louisiana, setting forth the above decree and averring that pending the proceedings in the District Court of Alabama the marshal, under an order of the district judge made on May 12, 1868, had delivered up the steamer, notwithstanding the appeal to the Circuit Court which had operated as a *superseas*; that, pending said appeal, Ross and Stewart removed the steamer to New Orleans where she is now held by the Ocean Tow-boat Company, under a claim of title derived from one Thomas McClellan Sep. 28, 1869. The libel asserts a maritime lien on said steamer, and prays for process. Apr. 9, 1872, the United States District Judge of the Louisiana District dismissed the libel. An appeal was taken to the Circuit Court, and in March, 1873, that court reversed the decree of the District Court and entered a decree for the libelants for the sum set forth in the decree of the Circuit Court of Alabama, together with interest and costs of the District and Circuit Courts of Alabama, and of the District and Circuit Courts of Louisiana.

From this decree the present appeal is taken.

The case further appears in the opinion.

Mr. D. C. Labatt, for the appellant.

Messrs. P. Phillips, Thos. J. Sommes and Robert Mott, for the appellees.

Mr. Justice Hunt delivered the opinion of the court:

The appellants insist that, at the time the libelants took their appeal from the decree of the District Court of Alabama, the vessel proceeded against *in rem* was not in the actual or constructive possession of the District or Circuit Court, but that she had been previously restored to the claimants by virtue of an order of the District Court, under which the Marshal could justify.

The main facts on this point are as follows: The vessel had been seized by the Marshal of the District of Alabama, upon libels filed by Otis and others, and was held by him on the 11th day of May, 1868. On that day, the United States District Court, sitting in Alabama, adjudged that the claims contained in the libels did not constitute a maritime lien, so as to give the court jurisdiction, and dismissed the libels with costs. On the next day a motion was made by the claimants that the vessel be delivered to Stewart & Ross, trustees of the mortgagees, entitled to the possession of the same. The record contains a memorandum that this order was granted.

At the time the decree of dismissal was rendered, and within a few minutes thereafter, a motion was made to the judge holding the court, that an appeal from said decree be al-

NOTE.—Lien for repairs and necessities and for salvage and freight. *Proceedings for*, in rem. *Blaine v. The Charles Carter*, 8 U. S. (4 Cranch), 328.

lowed; which motion was granted, and an order was then and there made, fixing the amount of the bonds to be given on the said appeal. The bonds were given, and accepted by the clerk of the court. These bonds are dated and approved, some of them on the 14th, and some of them on the 15th of the same month.

This appeal operated as a stay of all proceedings upon or under the judgment. The appeal was well allowed, the bonds are in compliance with the order of the court so far as it appears, were accepted by the clerk, and were not objected to by the parties. We cannot agree with the argument of the claimant that, under such circumstances, the Circuit Court in Alabama had no jurisdiction of the appeal, and that its decree was void.

The appeal stayed all proceedings, and the parties were bound to keep the vessel where it then was, to wit: in the possession of the court. The appeal was taken and allowed before any order of discharge was granted, and the bonds required to make the appeal a stay of proceedings were given within the time required by the statute.

The removal of the vessel pending an appeal to the Circuit Court was illegal, in violation of the express directions of the statute regulating appeals.

We do not understand the law to be that an actual and continuous possession of the *res* is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court and brought within its control the jurisdiction was complete. A subsequent improper removal cannot defeat such jurisdiction. The present claimants are not *bona fide* purchasers, setting up new interests. They are purchasers only of such interest as passed under the claims of Mrs. Price and Mr. Williams. This was the very title set up, litigated and decided in the Alabama suit. It cannot again be interposed and litigated a second time, as a defense to that decree.

In *Cooper v. Reynolds*, 10 Wall., 817 [77 U. S., XIX., 932], the court say: "Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular case depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause."

In the case of *The Brig Ann*, 9 Cranch, 290, 291, Chief Justice Marshall says: "In order to constitute and perfect proceedings *in rem* it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession when it is submitted to the process of the court; it is constructively so when, by a seizure, it is held to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*."

*** Before judicial cognizance can attach upon a forfeiture *in rem* under the statute there must be a seizure, for until seizure it is impossible to ascertain what is the competent forum. And if so, it must be a good, subsisting seizure at the time when the libel or information is filed or allowed. If a seizure be completely and explicitly abandoned and the property restored by the voluntary act of the party who has made the

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seizure, all rights under it are gone. * * * It is not meant to assert that a tortious ouster of possession, a fraudulent rescue or relinquishment of her seizure will divest jurisdiction. The case put is that of a voluntary abandonment and release of the property seized, the legal effect of which must be, we think, to purge away all the prior rights acquired by the seizure."

In *Taylor v. Carryl*, 20 How., 599 [61 U. S., XV., 1038], the rule is thus laid down: "In admiralty, all parties who have an interest in the subject of the suit, the *res*, may appear, and each may propound independently his interest. The seizure of the *res* and the publication of the monition or invitation to appear is regarded as equivalent to the particular service of process in law and equity. But the *res* is in no other sense than this the representative of the whole world. But it follows that, to give jurisdiction *in rem*, there must have been a valid seizure and an actual control of the ship by the marshal of the court; and the authorities are to this effect. *Jennings v. Carson*, 4 Cranch, 2; *The Phebe*, 1 Ware, 362. In the present instance the service was typical. There was no exclusive custody or control of the bark by the marshal from the 21st day of January, 1848, to the day of sale, and when the order of sale was made in the District Court she was in the actual and legal custody of the sheriff."

We hold the rule to be that a valid seizure and actual control of the *res* by the marshal gives jurisdiction of the subject-matter, and that an accidental or fraudulent or improper removal of it from his custody, or a delivery to the party upon security, does not destroy jurisdiction. *Jennings v. Carson*, 4 Cranch, 23. In the present case, the order for restoration was in direct violation of the statute regarding appeals, and did not operate to destroy the jurisdiction of the Circuit Court. That court was authorized to proceed as if no such order had been made.

It is further insisted by the appellants that the Circuit Court in Alabama had no authority to render its decree, for the reason that the subject-matter, to wit: materials and repairs to a vessel in a domestic port, gives no ground of jurisdiction. There are several answers to this suggestion:

1. We do not know that the facts are as alleged in the objection. Supplies were furnished and repairs were made, but whether the vessel was an American or a foreign vessel we have no means of determining. The report of the master makes reference to various matters which would authorize a determination either way, but the testimony itself is not given. Until a short time before the furnishing the materials the vessel had been a Mexican vessel, and the claimant had repeatedly stated that she was a foreign vessel, but how the fact was we have no legal means of determining.

2. Whether the vessel was foreign or domestic was one of the questions presented to the Circuit Court and passed upon by it, and conclusively. *Hudson v. Guestier*, 6 Cranch, 284.

3. If there was error in the decision on this point, it was error only and not an excess of jurisdiction. The vessel was in possession of the court when the suit was commenced. It was the duty of the court to decide whether the proceeding should be *in rem* or *in personam*.

and until reversal its decree on this question is conclusive.

The judgment and decree of the Circuit Court in Alabama, that the vessel was subject to the lien of the libelants' claim, remaining in full force, was conclusive of the right of such claim when alleged in the District of Louisiana. Story, Conf. L., sec. 592, 593.

The judgment of the Circuit Court to that effect was right, and must be affirmed.

Ex parte IN THE MATTER OF LOUISA C. MEDWAY, *Petitioner.*

(See S. C., 23 Wall., 504-507.)

Court of Claims—new trial in.

Where the mandate of this court required the Court of Claims to proceed in the cause remanded in conformity to law and justice, the Court of Claims may set aside the finding of facts which had been made on the first trial, and try the case *de novo*.

[No. 9. Original.]

Argued Apr. 23, 1875. Decided May 3, 1875.

PETITION for *mandamus*.

This is a cotton claim, brought in the Court of Claims, under the Abandoned and Captured Property Act.

There were four issues to be tried: 1, ownership; 2, seizure; 3, sale, and proceeds deposited in Treasury; and 4, loyalty, or, in case of alienage, neutrality.

Upon the trial, the court found in favor of the plaintiff upon the first three issues, but against her in the fourth; and so her petition was dismissed. It found the facts to be that she was the owner of nineteen bales of sea-land and seventy-five bales of upland cotton; that they had been seized by the United States officers, sold in N. Y., and that the proceeds thereof were then in the Treasury. But the court failed or neglected to make a computation of the amount of such proceeds in dollars and cents, although her attorney made a specific request upon the trial, to find this particular fact. These findings of fact and this request were duly filed, and became part of the record. The plaintiff appealed to this court where the case was No. 155, 1873. The judgment was reversed, and the case remanded for further proceedings in conformity with law and justice.

Dec. 9, 1878, the plaintiff filed this mandate in the Court of Claims, and moved that court to proceed with the case from the point reached by the reversal, which she alleged to be in conformity with law and justice; but the said court, upon the contrary, ordered that a trial be had *de novo*.

Thereupon the plaintiff obtained from this court a rule upon the Judges of the Court of Claims, to show cause why a writ of *mandamus* should not be issued, to compel them to vacate their order of Apr. 5, 1875, for a trial of the case *de novo*. It was upon the return of that Rule that this case was heard.

Mr. Thos. Wilson, for petitioner:

The court below having once tried the case, and having decided every question of fact arising in it, except making the computation and statement of the amount in dollars and cents,

and having filed its findings in the nature of a special verdict, and an appeal having been had to the Supreme Court, which reversed the judgment and remanded the cause for further proceeding, the court below should be now required to proceed from the point reached by the reversal, and cannot go back over and retry those questions of fact which were settled and determined on the former trial, and which, being certified to the Supreme Court on appeal, formed the basis of its reversal.

Cameron v. McRoberts, 8 Wheat., 591; *White v. Atkinson*, 2 Call., 376; *Price v. Campbell*, 5 Call., 115; *Campbell v. Price*, 8 Mun., 227; *Cunningham v. Ashley*, 14 How., 377; S. C., 13 Ark., 658; *Lyon v. Merritt*, 6 Paige, 473.

It is the duty of the lower court to carry into effect and execution, promptly and without delay, the mandate of the appellate court. It must do this literally and without evasion. It must proceed with the case from the point reached by the reversal.

Cox v. Pruitt, 25 Ind., 90; *Canal Co. v. Gordon*, 2 Abb. U. S., 479, by Judge Field, 9th Cir. Cal., 1868; *West v. Brashear*, 14 Pet., 44; *Ex parte Dubuque & Pacific R. R. Co.*, 1 Wall., 69 (68 U. S., XVII., 514).

The judgment alone was reversed. The findings of fact remained unreversed and in full force, the same as would a case stated, the report of an auditor, or a special verdict. This is admitted by the court in its order of Apr. 5, setting the same aside.

But for this finding as to ownership, seizure, sale and proceeds in the Treasury, the judgment would not have been reversed. It was upon these findings that the reversal was made; yet the Court of Claims, upon regaining jurisdiction of the case, so far ignore the action of the Supreme Court as to strike out and set aside the finding of those facts upon which that court based its reversal.

If upon each reversal and remanding there be allowed a trial *de novo*, there may be injected another and a new defense, which may result in another decision upon another issue, and the granting of another appeal, and so on until the last issue is disposed of by the second, third, or perhaps fourth appeal, the number of appeals being limited only by the number of issues in the case.

This is the inevitable result of the position taken by the Court of Claims. That it is erroneous, is clearly shown by the authorities above cited.

Mr. John Goforth, Asst. Atty-Gen., for respondents.

Mr. Chief Justice Waite delivered the opinion of the court:

Our mandate required the Court of Claims to proceed in the cause remanded, in conformity to law and justice. We did not undertake to direct what law and justice did require, any further than to say that upon the finding of facts appearing in the record sent to us upon the appeal, the judgment was erroneous. In everything else the Court of Claims was left free to proceed with the cause in its own way and according to its own judicial discretion. That discretion we cannot control in this form of proceeding.

The petition is dismissed.

GEORGE W. BROWN, *Appt.*,

v.

RUFUS B. GUILD, Executor of GEO. I. BERGEN, Deceased, and FREDERICK P. Sisson.

GEORGE W. BROWN, *Appt.*,

v.

JAMES SELBY ET AL.

(See S. C., "The Corn-planter Patent," 23 Wall., 181-245.)

Application for patent—prior invention—fraud in obtaining patent—construction of claim—infringement—combination—Brown's patents for seed-planting.

1. A mere application by another for a patent is not a bar to a further patent. It can only have a bearing on the question of prior invention or discovery.

2. If the alleged prior invention or discovery was never perfected or brought into actual use, but was abandoned, it is only an unsuccessful experiment.

3. The claim of re-issue No. 1037, of Brown's patent, which is for the construction of a shoe or runner for seed-planting machines generally, cannot be sustained.

4. The question of fraud in obtaining a re-issue of a patent must be regarded as settled by the decision of the Commissioner of Patents.

5. The clause of a claim, "substantially as and for the purpose set forth," refers back to the specification for a qualification of the claim, and the several elements of which the combination is composed.

6. A combination of the material parts of an entire machine is not infringed except by the use of the entire combination.

7. It is no objection to the validity of a patent for a combination which is new, and produces a new and useful result, that some of the elements of which it is composed are not new.

8. Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device or part of the machine, this is a declaration that the specific combination or thing claimed is the only part which the patentee regards as new. The rest he impliedly disclaims as old.

9. The court ought to give a favorable construction, so as to sustain a patent if it can fairly be done.

10. Re-issue 1091 is void; re-issue 1092 is not patentable; the proper location of the seat of a machine does not require the exercise of inventive power.

11. The patent, re-issue 1038, which substantially corresponds with re-issue 1037, cannot be sustained.

12. The patent, re-issue 1094, is for a matter too frivolous to form the subject of invention. It is simply for a peg or stop to prevent the rear part of the machine from tipping, and is not sustained.

13. Brown's re-issued patents, numbered respectively 1036, for a seed-planting machine; 1038, for a combination of frame work with such a machine; and 1039, for a method of seed-dropping, and for improvements of the first series; and 1045, for a peculiar valve called the flipper-valve in the tube through which the seed is dropped, of the second series, are sustained as good and valid patents, and the appellees are infringing the same.

[Nos. 11, 12.]

Argued Jan. 16, 17, 20, 1873. Decided May 4, 1874.

A PPEALS from the Circuit Court of the United States for the Northern District of Illinois.

The cases are stated by the court.

Mr. George Harding, for appellant:

I. In determining the validity of a re-issued patent, the only question left open for the court is, whether, on a comparison of the re-issued patent with the original specification, drawing and model, the subject-matter of the

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re-issued claims, can be found therein; if so, the re-issued patent is valid.

Seymour v. Osborne, 11 Wall., 516 (78 U. S., XX., 83); *Eureka Co. v. Bailey Co.*, 11 Wall., 488 (78 U. S., XX., 209); *Parham v. Button-hole Co.*, 4 Fish., 468.

II. The granting of a re-issued patent in separate divisions instead of in one patent, is a matter in the discretion of the Commissioner of Patents.

Bennet v. Fowler, 8 Wall., 445 (75 U. S., XIX., 431); *Penn. Salt Co. v. Gugenheim*, 8 Fish., 423; *Seymour v. Osborne* (*supra*); *Edwards v. Darby*, 12 Wheat., 210.

III. As to the legality of claims in the forms contained in re-issues 1039, 1091 and 1092, and as to the construction of the claims of the re-issues generally,

See, *Seymour v. Osborne* (*supra*); *Roberts v. Dickey*, 4 Fish., 532; *Seymour v. McCormick*, 19 How., 96 (60 U. S., XV., 557); *McCormick v. Talcott*, 20 How., 402 (61 U. S., XV., 930).

IV. As to what is required in a prior invention to defeat a patent, and as to prior public use, see, *Whitely v. Swayne*, 7 Wall., 685 (74 U. S., XIX., 199); *Agawam Co. v. Jordan*, 7 Wall., 583 (74 U. S., XIX., 177); *Seymour v. Osborne*, 11 Wall., 552 (78 U. S., XX., 41); *Washburn v. Gould*, 8 Story, 122; *Howe v. Underwood*, 1 Fish., 160; *Cahoon v. Ring*, 1 Clif., 612; *Union Sugar Ref. Co. v. Mathiessen*, 2 Clif., 304; *Cox v. Griggs*, 2 Fish., 177; *Johnson v. Root*, 2 Clif., 123; *Gayler v. Wilder*, 10 How., 498; *Parkhurst v. Kinsman*, 1 Blatchf., 488; *Lewis v. Marling*, 1 Web. Pat. Cas., 493; *Sayles v. R. R. Co.*, 4 Fish., 584; *Roberts v. Dickey*, 4 Fish., 532.

V. As to the certainty required in establishing the nature of an alleged prior invention, and in fixing its date, see, *Wood v. Cleveland Roll. Mill Co.*, 4 Fish., 559; *Parham v. Button-hole Co.*, 4 Fish., 468; *Hayden v. Suffolk Mfg. Co.*, 4 Fish., 98; *Tompkins v. Gage*, 2 Fish., 580; *Goodyear v. Day*, 2 Wall., Jr., 299; *Cox v. Griggs*, 2 Fish., 177; *Woodman v. Stimpson* 3 Fish., 110.

VI. As to modifications of prior devices to convert them into the patented improvement, see *Wood v. Cleveland Roll. Mill Co.* (*supra*).

VII. As to what constitutes infringement and the doctrine of equivalents as applicable thereto, see, *Seymour v. Osborne*, 11 Wall., 516 (78 U. S., XX., 83); *Union Sugar Ref. Co. v. Mathiessen*, 2 Clif., 304, S. C., 3 Fish., 600.

VIII. As to the effect to be given to the patents of appellees of date subsequent to the date of appellant's patent, see, *Blanchard v. Putnam*, 8 Wall., 425 (75 U. S., XIX., 435).

Messrs. S. S. Fisher and Gookins & Roberts, for appellees.

(This argument was confined so much to facts as not to be of great general practical importance.)

Mr. Justice Bradley delivered the opinion of the court.

These cases arise upon separate bills in equity, filed in the court below by the appellant against George J. Bergen and Frederick P. Sisson, in the one case, and James Selby and others, in the other case, charging them respectively with infringement of certain letters patent granted to the complainant for improvements in corn-planting machines, being re-issues of previous

patents, and praying for an account of profits, for injunction and for general relief. The defendant in the first named case filed an answer and two amended answers, setting up in general that the complainant was not the original and first inventor of the improvements patented to him, but that the same were previously known and used by various other persons named in the answer; and that the re-issued patents of complainant were fraudulently obtained; and they denied that they infringed the complainant's patents. The pleadings in the other case were substantially the same. Much testimony having been taken, the causes were heard together before the Circuit Court, and the complainant's bills were severally dismissed. Appeals are from those decrees. Bergen, one of the original defendants in the first case, having died, the cause was revived in the name of his executors, who, with the other defendant, Sisson, are the now appellers in that case. The principal question in those causes is, whether the appellant was the original and first inventor of the improvements claimed by and patented to him, or whether he was anticipated therein by other persons named in the answers of the defendants.

As set forth in the bill, the first patent obtained by the complainant for one portion of his alleged invention and improvement was granted to him on the 2d day of August, but antedated the 2d day of February, 1858. This patent was surrendered on the 16th day of February, 1858, and a new patent was issued in lieu thereof upon a corrected specification. This re-issued patent was also surrendered on the 11th day of September, 1860, and in lieu thereof, five new patents were issued upon five several corrected specifications, which new patents were numbered respectively re-issues 1036, 1037, 1038, 1039, 1040, each one being for a distinct and separate part of the original invention alleged to have been made by the complainant.

On the 8th day of May, 1855, a patent was granted to the complainant for certain improvements on his corn-planter, which patent was, on the 10th day of November, 1857, surrendered, and a new patent was issued in lieu thereof on a corrected specification. This last patent was also surrendered on the 11th day of December, 1860, and five new patents were issued in lieu thereof, on five amended specifications, each being for a distinct and separate part of the improvement intended to be secured by the patent of 1855. The last-mentioned patents were respectively numbered, re-issues 1091, 1092, 1093, 1094 and 1095. Copies of all the re-issued patents of both series were annexed to the bill. Upon the taking of proof in the cause, copies of the two original patents and of the first re-issues thereof as well as the re-issued patents on which the bill was founded, were put in evidence together with full and detailed drawings and models of the complainant's original and improved machines.

The defendants in their answer and the several amendments thereof, referred to many machines, patents and applications for patents, which, as they alleged, embodied all the improvements of the complainant's machine and antedated the same. These will be more particularly referred to hereafter.

Without stopping here to inquire into the distinctive features of the several re-issued patents granted to the complainant in 1860, whether of the first or second class, we will endeavor to describe his corn-planting machine as actually exhibited in the original patents, drawings and models thereof. Such a description is necessary in order to a correct understanding of the various patents and of the points and questions which have been raised thereon.

The original machine, the patent for which was granted to the complainant on the 2d day of August, 1858, and the application for which patent was dated the 27th of September, 1852, consisted of the following parts:

1. A frame-work supported on two runners, the latter being used for cutting a gash or furrow into the earth to receive the seed; each runner having a cleft at the rear end for allowing the seed to drop to the ground, and furnished with a hopper above containing oscillating horizontal valves, for dropping the seed at proper intervals into the gash or furrow, through a tube in the heel of the runner.

2. Another frame-work following the first and supported on two wheels or rollers, to follow the runner and press the earth down upon the seed in the gash or furrow.

3. A free or jointed connection between the two frames allowing them to rise and fall independently of each other, in going over inequalities of surface.

4. A system of levers resting on the axle of the wheel under the rear frame, and so applied to the forward frame as to enable the driver to raise the runners out of the ground for turning about or for any other purpose with an arrangement for regulating the depth of the furrow or gash made by the runner.

5. A connecting rod between the seed-valves in the two hoppers, one end attached to each, with a lever to move it backward and forward, by the hand of the dropper sitting crosswise on the frame, so that he may by such movement drop the seed from both hoppers at the same time, at the intersection of the cross lines marked on the field.

The machine is described with substantially these parts in all the specifications and drawings attached to all the patents.

The improved machine as patented in 1855, had two additional features or improvements:

1. A valve called "a flipper-valve" in each seed-dropping tube, which valve is composed of a long, slender slip of metal attached to a pivot in the middle, so that when the top is moved to one side of the tube the bottom moves to the other side. By one movement the seed drops into one side and is detained near the bottom till the next movement, when it is dropped on the ground and seed is admitted on the other side. The effect of this arrangement is, that the seed is near the bottom of the furrow when it is dropped, so that it is immediately deposited in line with the check row. And the peculiarity of the apparatus is such that it requires but one movement of the levers above to drop for a single hill.

2. Another improvement was a high, long seat for the driver, on the rear frame, located above the wheels lengthwise of the machine, so that by moving backward or forward on the seat, his weight will raise or depress the runners.

The only claims allowed by the Patent Office upon the original application in 1858, were:

1. "The oscillating horizontal wheels or distributors, namely: the valves before referred to, in the bottoms of the hoppers, having slots and holes of various sizes in combination with the stationary caps and pins for the discharge of different kinds and quantities of seeds as set forth in the specification."

2. "The arrangement of the covering-rollers, mounted as described and performing the purpose of covering the seed, elevating the cutters in turning round, and also in adjusting to different depths, as set forth."

Other claims were applied for, but were disallowed.

The five re-issues or new patents issued September 11, 1860, in lieu of the original patent of August 2, 1858, and of its first re-issue in 1858, were for a number of supposed distinct inventions comprised in the machine, and each contained one or more separate claims.

The claim allowed in the patent of May 8, 1855, for the improvements added to the machine were as follows:

"In combination with the hoppers and their semi-rotating plates, d, the runners a, with their valves f, and their adjustment by means of the levers and cams and the driver's weight for the purpose of carrying and dropping seeds by each vibration of the lever d, and to regulate the depth of the planting as described."

By the re-issue of December 11, 1860, this patent was subdivided into five new ones; each having one or more separate claims.

The claims of the several re-issued patents will be fully examined hereafter.

A proper decision of the questions in the cause renders it necessary, in the first place, to ascertain, as near as may be, the actual date of Brown's alleged invention or inventions, such as and whatever they are. His original application for a patent was sworn to on the 27th of September, 1852. But it appears from his own testimony, which does not seem to be discredited, but rather corroborated by others, that he was making experiments in 1850, on a machine which formed the nucleus of his completed invention. He further says that in January or February, 1851, he made a machine which he describes as follows:

"It had two runners and two wheels, two cross-bars and a nose-piece, two braces, dropper's seat, and a tongue. The wheels were hung through the seed-boxes by arms. There were arms running back from the seed-boxes, which the wheels run in, coupled through the seed-boxes with a bolt. I had a loop running down each side of the wheel that went onto the axles on the wheels, and worked a couple of short levers fastened on this loop running forward under the fore part of the machine, and running back far enough to put a cross-piece on behind. I am a poor hand at describing it. The seed slide passed through the hoppers, running from one to the other, and the lever operated it with the hand, with a person located on the machine crossways, so that he could see the marks plain on the ground."

Further evidence was given by him descriptive of the machine, and showing its substantial identity with the machine as it stood when the patent was granted.

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This, however, was only a model. But it had all the main characteristics of the perfected machine, except that the circular valves were not contained in it, the seed being dropped from the bottom of the hopper by the movement of a straight slide. He further testified that in 1852 he sent that model by his brother to Washington, and that it was very nearly the same as the model filed in the Patent Office, a copy of which was shown to the witness, and is an exhibit in the cause. He further states that in the same year he made, after the plan of the model, a machine of one half the usual size, but large enough to work with, and that he planted three or four acres of corn with it in May, 1851. He says it worked well. In September of the same year, after harvest, he invited several persons to come and see it operate, giving their names. Several of these witnesses were called and fully corroborate his testimony. Early in 1852 he commenced constructing ten machines, but completed but one of them that spring. With this one, and the half-sized machine before mentioned, he planted over twenty acres of corn, namely: sixteen for himself and eight for Allen Brown. At this time, he says, he introduced into these machines the circular valves, or dropping-plates, in place of the slides, thus completing the machine as it stood when he applied for his patent and made the model now before us, which was during the same season. The following spring, 1853, before corn-planting time, he had completed a dozen machines containing all his improvements, and sold them to various persons. Some of them, he says, planted as much as three hundred acres of corn. These machines, he says, contained the high seat and flipper-valve, which were the subject of the patent dated May 8, 1855.

The appellees have endeavored (but we think unsuccessfully) to discredit the statements and testimony of Brown, especially as to the existence of rollers for covering the seed in the model and small-sized machine made in the early part of 1851. He is corroborated on this point by his nephew, V. R. Brown, and others; and nothing but negative testimony is adduced to the contrary.

We think it clear that his machine (except the seat and the flipper-valve) was substantially invented in the beginning of 1851, and that in April or May of that year he had constructed and used a small, working corn-planter, containing all the material parts of his machine as it was when patented, except the circular valve in the hopper, which was added as an improvement on the straight slide in the spring of 1852.

We will next proceed to inquire what machines belonging to the same general class had been invented prior to this period, in order to show the state of the art at that time.

It cannot be seriously contended that Cooke's drill, and other machines of the kind, described in the *Farmer's Encyclopedia*, bear any resemblance to the specific features of Brown's corn-planter. The furrows are made by coulters fixed in beams, and the grain is covered by harrows following the drills. The latter are hollow tubes which are supplied with the seed grain by a revolving cylinder having little cups, or cavities, in its surface, which become filled as they revolve in the bottom of the hopper.

It is hardly necessary to consume time in ref-

erence to the alleged invention of Joab Moffatt, in or about the year 1834, models of which, made from the supposed recollection of witnesses, have been presented to the court. Moffatt himself was placed on the stand, and swears that he has no recollection of having ever invented such a machine. And it is a little singular, if he did invent such a perfect machine as the models represent, approaching so closely in every particular to Brown's corn-planter, that it should have gone into total disuse and oblivion. The general aspect of the evidence relating to this supposed machine, and some remarkable individual features which it exhibits, are sufficient to justify us in throwing it entirely out of the case.

An English patent, obtained by one Hornsby in 1840, was introduced; but the mechanism described therein has very slight resemblance to the corn-planter. It consists of a hollow wheel, with angular compartments and doors in the circumference to receive seed and manure from a hopper, and deposit them on the ground by the revolution of the wheel. This wheel is situated in rear of a coulter running in the ground, and does not touch the ground itself, but is supported on the frame of the machine, which in turn is supported by large driving-wheels on the outside of the frame. The coulter and deposit-wheel are located in the inside of the frame. The inventor, however, observes that more than one coulter and deposit-wheel may be used. No method is described for covering the seed or pressing it into the ground. The side view of the coulter exhibited in the drawing bears some resemblance to the runner in Brown's machine; but we have no other description of it, or of the manner of its operation.

Thomas' cotton seed-planter, patented in 1841, is next adduced. It consists of a long bed piece of plank, supported by two wheels, one on each side, and having a sort of keel underneath, running along the middle, for making a crease or furrow in the ground, and keeping the machine in a direct course. In the middle of the bed-piece, over the axle of the wheels, is an aperture to allow a seed-roller affixed to the axle to revolve, having alternate ridges and seed-holes. Over this is a hopper, which holds the seed and communicates it to the seed-roller, by whose revolution the seed is dropped into the furrow. A loose flap is hinged to the rear end of the bed-piece, and drags along on the ground, for covering the seed with dirt. The keel in this machine bears some resemblance to the runner of the corn-planter. This patent requires no further observation. It exhibits a semblance only of one or two elements of Brown's machine.

The next machine in order of time is Henry Todd's, of Oxford, New Hampshire, patented December 15, 1843. It is thus described by the witness, Hale: "The main portion of the machine consisted of a plank or surface-board, three or four feet long, one foot wide, and tapered to a point in front. The seed-box was fastened to said plank. The seed was distributed by cups upon a belt, upon the principle of a flour elevator; the motion was communicated by band from a roller at the rear of the machine; said roller also serving to press the earth over the planted corn. A cutter was fastened to the bottom of said plank, for opening a drill for dropping the seed, and a couple of con-

verging wings fastened to the rear and bottom of said plank for covering the seed. The cutter before mentioned had an upward incline in front, and at the front was thin and sharp, spreading out at its rear end." The machine was managed much like a plow, having two handles. The roller in the rear was connected with the front part of the machine by two arms, one on each side, in which were situated the bearings of its axle, and the forward ends of which were, by pivots or bolts, attached to supports, so that the roller could rise and fall independently of the surface-board or platform of the machine. It resembled Brown's machine in having a cutter (or runner) for making a furrow, in dropping the seed through a cleft at the rear of the cutter, in having a roller to press the earth upon the seed and in having a free connection between said roller and the machine. It differs from it in having but one cutter (or runner) and one roller; in having a pair of wing-like scrapers behind the runner to cover the seed with dirt; an automatic feeding apparatus incapable of dropping the seed in check or cross-rows; and having no levers, and nothing but the plow-handles to lift the cutters out of the ground.

Hale was the only witness examined on the subject of this machine. He says he helped Todd make six of them, and that they were used, and worked satisfactorily, in or about 1844. This being all that is heard of this machine in the cause, it is probable that its use was discontinued and that it shared the fate of a thousand other devices which approach the point of final perfection and success, but do not reach it. The differences between this machine and Brown's are just those differences which rendered the latter a success, and a valuable acquisition to the agriculture of the country.

Earle's planting plow, patented in 1846, may be dismissed even more summarily than Todd's machine. It operated automatically in depositing the seed, and was not adapted to check-row planting; the furrow was opened by a plow furnished with a double mold-board; and the seeds were covered by means of scrapers attached in a diagonal position behind the seeding apparatus. It had but one frame, and the seed was deposited by means of a drum, having cavities in its surface, revolving in the bottom of the hopper, and discharging the seed into a tube behind the plow.

Mumma's patent for a seed-drill, granted in 1849, was also put in evidence; but it describes only a grain-drill, devised to secure a more equal distribution of seed in the drills or furrows in ascending or descending hills, etc. "To the hind part of the frame a small trunk is jointed, with a long lever attached to it, by which the whole seeding apparatus is raised from the ground (when) it is transported from place to place." This device of the truck or jack and lever for prying up the machine when being turned or transferred from one place to another, bears some resemblance to Brown's method of raising the front frame of his machine by the levers resting on the drums or wheels. The patent is probably introduced to show this resemblance. It is so slight, however, that it can have no serious effect in the cause.

The machine of Remy & Kelly comes next. They applied for a patent in June, 1850, but

withdrew the application in August, 1850; for what cause does not appear. We have before us a copy of the application and accompanying drawings and models of the machine, and the examination of Remy and one Burgess in reference thereto. The machine consisted of a front, middle and rear frames, or parts, the former being mounted by two seed-boxes or hoppers, and being furnished below with two drill-teeth, which cut or scratched the usual small furrow in the ground, and through which the seed was deposited in the earth. Small rollers with cavities in their surfaces were made to revolve in the bottom of the seed-boxes, and thus carried out and deposited the seed in the drill-teeth in the usual manner of drills. The drill-teeth were followed by a transverse row of upright harrow-teeth for covering the grain. These harrow-teeth were inserted in a cross-bar framed into two long levers which were attached to the fore part of the front frame by a loose joint. This apparatus constituted the middle frame. The rear frame was also attached to the front frame by a loose joint, by means of side-bars, extending forward and connected thereto by bolts or pins, and was supported on a transverse roller consisting of four wheels or bulkheads, and iron bars connecting them together, making a sort of a rolling crate, which rested on the ground, supported the driver's seat and, by means of bands and pulleys gave a revolving motion to the seed-rollers before mentioned. An iron crank, within the driver's reach and fitted in bearings on the rear frame, enabled him to pry up the cross-bar holding the harrow-teeth, and with it the rear end of the front frame with the drill-teeth. This operation, as the tongue was fast and rested on the horses, raised the cross-bar and the rear end of the front frame so as to lift the drill-teeth and harrow-teeth out of the ground. In this respect it produced, by means somewhat different, a result similar to the lifting of the front frame and runners by means of the levers acting on the fulcrum of the wheels in Brown's machine. Only one machine, however, was ever made, and this was made merely for an experiment, in Brookville, Indiana, in the year 1849. It did not contain the pulley-strap for turning the seed-rollers, which the application and model exhibit as part of the invention. Remy, in trying the machine, walked alongside of it and, with a crank, gave the seed-rollers an oscillating motion with his hand, Burgess driving. In this way they planted five acres, which Remy says were planted even and cultivated both ways. But the machine was never used again and was afterwards broken up, and no other was ever made. Remy made many other corn-planting machines on a different principle, but he said there was no demand in that region for a machine of this kind.

The appellees contend that this was an anticipation of several material parts of Brown's machine. But it is obvious that it had not the runners nor the covering rollers, nor was it adapted to planting in check-rows. As presented to the Patent Office in 1850, and in the model exhibited to the court, it was planned for an automatic drill-planter. The experiment made in 1849, when Remy worked it by hand, was a mere experiment, which was never repeated. It may have presented one or two ideas in advance of other machines, but it can hardly

be said to anticipate the machine which we have described as Brown's. Were it not for the application for a patent it would justly be regarded as an abandoned experiment, incapable of being set up against any other claim. Can the fact that such an application was made and afterwards voluntarily withdrawn, and never renewed, make any difference? We think not. Had a patent been actually granted to Remy & Kelly, it would have been different. The case would then have come directly within the 7th section of the Act of 1836, which makes a "patent" or a "description in a printed publication" of the invention claimed, a bar to a further patent therefor. But a mere application for a patent is not mentioned as such a bar. It can only have a bearing on the question of prior invention or discovery. If, upon the whole of the evidence, it appears that the alleged prior invention or discovery was only an experiment and was never perfected or brought into actual use, but was abandoned and never revived by the alleged inventor, the mere fact of having unsuccessfully applied for a patent therefor, cannot take the case out of the category of unsuccessful experiments.

The next machine which we will examine is that of James Abbott, which is strenuously claimed as an anticipation of the complainant's machine, or of material parts thereof. Abbott resided in Brimfield, Peoria County, Illinois. Models of his machine are in evidence. No public description of it is produced. No patent was ever applied for by Abbott. He made his first machine in 1846, having one frame and two coulters. The seed was dropped behind the coulters, and the wheels of the machine passed over it. The coulters would clog, and he soon abandoned the machine. In 1848, he made another and put it in operation. Instead of coulters he now used runners, something in the form of a sled-runner, with wings behind to widen the furrow and make a place for dropping the seed. One of the runners was produced on the trial. It was made of wood and shod with iron. The machine had but one frame, and only one wheel, which was in the middle between the runners. On each side of the wheel were cams to operate L levers, which worked into the bottom of the seed-boxes and dropped the corn behind the runners. The seed was covered by scrapers or wings which followed the runners. Behind the wheel and runners there was a platform on which the driver stood, and by stepping backward or forward he could slightly elevate or depress the runners. This machine was automatic, a mere drill, and had nothing but the runner in common with Brown's machine.

Abbott then says:

"The next machine which I constructed was, according to the best of my recollection, in the spring of 1852, certainly not later than 1853."

He then proceeds to describe the machine. It had but one frame, and whilst it exhibited some of the same parts which are found in Brown's machine, yet it is obviously a different machine from Brown's, and intended as an automatic drill instead of a check-row planter. But as, in our judgment, the weight of the evidence (of which considerable was taken) is that it was constructed subsequently to Brown's, it is unnecessary to give it further consideration.

Another machine much relied on by the appel-

less was that of John Kirkman, of Peoria County, Illinois, a farmer, but formerly a mill-wright and engineer. He lived in the same neighborhood as Abbott, and the latter, in his evidence, says that after he had made a drawing of his last machine (above referred to), John Kirkman was at his house and took a rough sketch of the drawing, and soon after made a machine nearly like it, in which he had broad iron wheels. The character of Kirkman's machine is very explicitly shown, exact models of it and one of the actual runners being produced. It was composed of a single frame standing on two runners in front, and two wheels following the runners in the rear. The seed was placed in boxes or hoppers over the rear end of the runners, and was let down to the furrow through a tube inclosed in the rear of the runners by means of an automatic device operated by gearing connected with the wheels. Between the wheels was a platform on which the driver sat or stood. By stepping backward or forward on this platform, and changing the position as to the bearing on the axle of the wheels, the machine could be tipped up or down in front so as to raise or depress the runners. This action was facilitated by the tongue being freely attached by a bolt between the bounds so as to admit of a hinged motion. A cross-bar screwed to the top of the bounds above and the front cross-bar of the machine below the tongue limited the movement thus produced, and also regulated the depth of furrow. In the machine as first constructed a seat was rigged in the rear of the platform for the driver, by moving on which, backward and forward, the same tipping process could be produced. This was afterwards abandoned.

It will thus be seen that Kirkman's machine had some of the prominent features of Brown's. It differed from it in not being a check-row planter, and not planting in hills but in rows, and acting automatically simply as a drill, and having but a single frame.

Considerable evidence, much of it apparently conflicting, was adduced as to the time when Kirkman's machine, or rather several machines (for he built three at different times) were constructed.

The first was an experimental machine, which he had on the tapis for a year or two and finally abandoned. He then made another which failed at first, but afterwards, an alteration being made, it operated well, and he used it for several years, and finally sold it to one Wrigley, in 1856. His third machine was constructed when he sold the second to Wrigley. As the first machine was an experimental one subsequently abandoned, and as the third was made after both of Brown's original patents were issued, we are principally concerned with the second machine, which was sold to Wrigley. Kirkman's own testimony is quite positive that the Wrigley machine was made in 1850, and that the experimental one was made a year or two earlier. He says he tried the former (the Wrigley machine), and after planting half an acre with it (his son says "a few rows"), and finding that it did not work satisfactorily, he laid it aside and did not use it again for a year or two. Whether he used it in 1851 he can't remember. He says he did use it in 1852, having made an alteration in it, which made it to work satisfactorily. This alteration was the putting of seed-

rollers in the place of slides for letting down the seed, and driving them by a pitch-chain operating as a strap, connected with a hub attached to one of the wheels. He says: "This alteration was made sometime between the spring of 1850 and the spring of 1852." His son thinks the machine was altered and used in the spring of 1851. But there is a good deal of collateral evidence in the case to show that it was not in use (unless experimentally) in the season of 1851. Henry W. Snow, a lawyer by profession, testifies that in 1851, when he was a boy about fourteen years of age, his father moved to a farm adjoining Kirkman's, and he saw the planter in Kirkman's yard in that year, and that Kirkman was tinkering with it; that he was altering it by putting in a little chain to move the slide which made the corn drop, the slide being an angular lever. He further states his impression that the first time he saw this corn-planter was in the latter part of the summer of 1851. He says, also, that the quarter section of land, which joined his father's farm eastward, was called the Frink quarter, and was then (in 1851) open prairie; that it was subsequently, he thinks in 1852, purchased and improved by Kirkman. He knows it was not improved in 1851. Now, Francis P. Kingsley says that he knew of Kirkman's making a machine in 1852 or 1853; the description of which as given by him corresponds with the Wrigley machine after its alteration. He says it had "small seed-cups designed to drop one kernel at a time once in so many inches, about eight inches. They were counter-sunk into the cylinder or roller, with screws in the bottom to regulate the depth of the hole"; and that the seed-roller was moved by "a chain something like a buckle; a flat chain with open links." He says he was building one at the same time, and there was a little rivalry between him and Kirkman. He states that he went to see Kirkman's machine before it was finished, and went to see it work after it was completed; and that it was first used "in the field south of his house, on the land commonly known as the Frink quarter." Now, supposing this to be the spring of 1852, it corresponds and harmonizes with Kirkman's own testimony, and a great deal of other testimony in the cause. Two or three persons who worked for Kirkman in 1851, say that they saw no corn-planters used in that year, although they did the year following. Harrison Smith, a brother-in-law of Snow, who lived on the Snow farm in 1851, in sight of Kirkman's, testifies that he saw no corn-planter used by Kirkman in 1851, but that he did use one the next year on the Frink quarter. C. P. Snow, a brother of H. W. Snow, thinks he saw one used some by Kirkman in 1851, across the road; that is, on the land of Kirkman and the Frink quarter. Being asked how much he used it that year, he answered: "I didn't see him use it much; if any, but little; I don't know how much he used it." If this witness is correct, it is probable that what he saw was some experiment of Kirkman before he made the final alterations in his machine.

A review of the entire evidence on the subject leads us to the conclusion that Kirkman's second machine, called the Wrigley machine, was made in the early part of 1850; that he tried it that spring unsuccessfully; that he then laid it by, and did not attempt to use it again

until the spring of 1852, after he had made a material alteration in it—which alteration was made after the summer of 1851—and not completed, as it would seem from the evidence of Kingsley, until the spring of 1852. This would make the machine of Kirkman about contemporary with that of Brown's second machine, which he completed and operated in the spring of 1852; but would bring it, as a completed machine, subsequent to the half sized machine which Brown completed and operated in the spring of 1851, and publicly exhibited in September of that year.

The machine referred to by Abbott, as having been made by Kirkman by the aid of drawings furnished by him, was most probably the third machine made by Kirkman, in 1856, which is the only one made by him having iron wheels.

The evidence of Thomas Scholey, the blacksmith, does not disagree with this view of the facts. One of the identical shoes or runners of the Wrigley machine is produced in evidence and identified by Wrigley and by Scholey. The latter says he made it in the winter of 1850-51, with the help of his brother, who died in January, 1851. He is very positive on the subject. The entries in his book under date of February, 1853, of work done for Kirkman through Story probably relate to repairs, and not to the original construction of the machine. The amount of the items is not sufficient for the cost of the runners.

The last machines relied on as antedating the appellant's are those of Job Brown, also of Peoria County, Illinois. According to his testimony, he was experimenting on the subject in 1849, 1850 and 1851. In 1849 he made a machine with one runner placed under a plank. It bore no resemblance to the appellant's machine except as to the runner, and it did not work satisfactorily. In the spring of 1850 he made a second machine, having two runners and two wheels running behind them, to cover the seed, and a third wheel, larger than the others, situated forward in the middle, for the purpose of working the apparatus for dropping the seed. It was intended as a check-row corn-planter, and was tried for that purpose, but failed; and what was planted with it was planted only in single rows. It was afterwards abandoned. As Brown says, "It became common stock in my lumber yard." In the same year, 1850, Job Brown made another machine, or, as his son says, two of them, with two runners each; but they had no wheels running behind the runners to cover the corn. They had an iron shaft running through the hoppers, with an apparatus for taking up and dropping the seed; and this shaft had a wheel at either end, outside of the machine, for giving it a revolving motion. This machine had a seat for the driver, but only one frame, and the tongue was bolted fast to that, so that there was no means of tilting the runners out of the ground. Job Brown says that he altered this machine, in the spring of 1851, by changing the seeding apparatus. He removed the shaft and substituted lever-bars with slides entering the hoppers, and an upright lever extending above the seat, for working the bars. He thus placed a dropper as well as the driver on the seat. In 1853 he placed the wheels so as to run behind the runners. As thus finally altered it bore some re-

semblance to the appellant's machine, in certain particulars. It is true, it had but a single frame, with no hinged joint, and could not be tilted out of the ground; the driver and dropper had to dismount in order to turn around; nevertheless, it had a dropping device worked by hand by an attendant who dropped the seed in check-rows, and had a seat for both driver and dropper, and had runners and wheels running behind them to cover the seed. It was not thus completed, however, until 1853, long after the construction of appellant's machine. In the spring of 1851 Job Brown made two other machines. One was a two rowed machine with a single frame, having two runners, followed by two rollers; but, as Job Brown himself says, working automatically "as a drill-planting machine." We left off the lever entirely," he says, "and depended on the wheels to do their own dropping." His son says that it was also arranged to be worked by a hand-lever by an attendant on the machine. A model was put in evidence, which, as the son says, represents substantially this machine, but according to Job Brown's own testimony, this model represents the machine which was altered in 1853. Its features are substantially as before stated. Affected by this degree of uncertainty as to character and date, it must be received with caution, even on those points on which it presents resemblances to the appellant's machine. Job Brown constructed another machine in the spring of 1851, which presents, as he considered, the final and most perfect form of his inventions. It consisted of a single frame, with three runners and no wheels; a seat on the machine for the driver and dropper; and an apparatus worked by a hand lever for dropping the seed in check-rows. A model of it was given in evidence. Job Brown applied for a patent for this machine December 31, 1852, but subsequently withdrew the same. He says he conceived the idea of the machine in the early part of the spring of 1851, and completed it about the first of May, and used it for planting corn, planting about two hundred acres that spring. There is some evidence that this machine was made at an earlier date; but the weight of evidence agrees with this testimony of Job Brown. Its likeness and unlikeness to the appellant's machine are apparent from the above description. The apparatus for covering the seed consisted of a fan-shaped flange or tail projecting behind the runner. One of the persons who used it says that he had to follow behind to cover the seed, some of which would remain uncovered where the ground was uneven. Only the single machine above mentioned was made until 1853, when Job Brown says he had about forty of them made, and sold them to various parties. In a letter to the Patent Office, of August 5, 1853, urging his application for a patent, he refers to this machine as being the crowning result of seven years' experiments. He evidently regarded his other machines as experiments, or at least as secondary in importance and usefulness to the last machine.

We have not referred to the evidence of Nathaniel Smith or Butler, because we do not regard their testimony as materially adding to that of Job Brown and his son.

A machine of one Edward P. Farley, in-

vented in January or February, 1853, was introduced in the case for the purpose of showing that Brown's improvement of placing the driver on the machine, which formed one of the subjects of his second patent, had been anticipated. There was a long platform on Earl's machine, the front part resting on and fixed to the runners, the rear resting on the axle of covering wheels following the runners. The driver rode on this platform, and by stepping forward he could press the runners deeper into the ground, and by stepping back he could raise them out of the ground, using the wheels as a fulcrum. The bearing of this machine on some of the re-issued patents will be noted hereafter.

On the subject of the flipper-valve (so-called), the appellees have introduced two machines, one by Charles Finn. for which he applied for a patent in April, 1852, but which application was rejected; and the other by Jarvis Case, for which he applied for a patent December 9th, 1858.

These devices will be examined more particularly hereafter, when we come to consider the claim for the flipper-valve as contained in the re-issued patent No. 1095.

We have thus gone over and explained, as well as the subject will admit, the various machines and inventions which constitute the history of the special art under consideration, up to the time that Brown's machine was produced. In the light of this review we are to determine the extent and character of his various patents and claims, and how far they are valid or void.

It is very obvious, at a glance, that the claim of re-issue No. 1037, which is for the construction of a shoe or runner for seed-planting machines generally, cannot be sustained. That device was used long before Brown made his machine. Without adverting to Thomas' cotton seed-planter, it was contained in Todd's patent in 1843, and was used by James Abbott in 1848, by Kirkman in 1850, and probably by Job Brown in the same year and the year before. There is nothing in the particular form and shape of the appellant's runner which is sufficiently diverse from others that preceded it, to entitle it to the merit of an invention.

Most of the other claims are more complicated, and require more careful consideration to understand their fair scope, in view of what had been accomplished before. It may be remarked in passing, that, in our view, the several re-issues are for things contained within the machines and apparatus described in the original patents; but whether they were anticipated by prior inventions, or are void for any other reason applicable to patents and claims generally, is still open. The question of fraud in obtaining these re-issues must be regarded as settled by the decision of the Commissioner of Patents.

The first patent in the series of re issues is No. 1036, by which is claimed as the invention of the appellant a "seed-planting machine, constructed principally of framework, the front part of which is supported on not less than two runners or shoes, with upward-inclining edges, and the rear part supported on not less than two wheels, the latter being arranged to follow the former, substantially as and for the purpose set forth."

The machine is so constructed that an additional pair of wheels may be attached to it for the purpose of dropping the seed automatically where the nature of the soil is such as to render this method admissible in check-row planting. But with that aspect of the machine we are not at present concerned, except as it affects the general description of the machine as a whole. The specification describes the manner of its construction and operation for both automatic planting and hand planting. It is in its latter aspect that we shall principally examine it.

The last clause of the above claim, "substantially as and for the purpose set forth," throws us back to the specification for a qualification of the claim, and the several elements of which the combination is composed. The thing patented is not only, first a seed-planting machine, made principally of framework, but, secondly, it is composed of two distinct parts; thirdly, the front part is supported on two or more runners with upward-inclining edges; fourthly, the rear part is supported on two or more wheels, arranged to follow the respective runners, and each and all of these parts are to be thus constructed and combined "substantially as and for the purpose set forth." That is to say, the object and purpose of the machine as a seed-planting machine is explained to be to plant corn in check-rows, so that it may be cultivated both ways, and its construction is adapted to that end. The devices used for effecting this purpose, both automatically and by hand, are described in the specification, but they are claimed in separate patents, and only affect the one in question as they modify and affect the general structure of the machine. Again; the object and the purpose of constructing the machine of framework in two distinct parts, supported separately, one by the runners and the other by the wheels, is expressed to be "so that the rollers may rise and fall without disturbing the runners, or so that the runners may yield or move independently of the rollers." The particular manner of connecting the parts, although described in the specification, is the subject of a separate patent. Again; the object and purpose of the runners and wheels or rollers, the latter arranged to follow the former, is set forth, the former to make a furrow for the seed, the latter to "close up and press the earth down over the seeds." The adaptation of the machine, and the several parts mentioned, to these several objects and purposes, is thus made a part of the combination of elements called for and made requisite in the claim under consideration.

The claim thus limited is considerably narrowed in its operation. It is substantially for a combination of the material parts of the entire machine, and no one can be said to infringe it who does not use the entire combination.

The first question to settle is, whether, as thus limited and restricted, the patent is valid, or whether the invention, as thus patented, was anticipated by prior inventions.

It is obvious that we may lay out of the question all seed-drills. They were not constructed for the specific purpose for which this machine was constructed, namely: to plant corn in check-rows, and had not the apparatus

adapted to such a purpose. The plow-shaped drill of Todd, though it had a cutter under the front part and roller drawn behind for covering the grain, was only a step in the right direction. It was a mere drill, planting in single rows, and not adapted to plant in check-rows; and it was handled and operated in an entirely different manner from Brown's.

Earle's, Mumma's and Remy & Kelly's inventions may also be dismissed without observation. The description of them heretofore given shows that they were mere drills, that they had no covering wheels, and were not constructed for nor adapted to the purpose for which Brown's machine was made. Besides, as before seen, the machine of Remy & Kelly was a mere experimental one, abandoned by the inventor. We may also lay out of view Abbott's drill, constructed in 1848, the only one that can by possibility be brought into the case. That had no covering-wheels, had but one part or frame, and was not a check-row planter. Kirkman's machine also had but a single frame or part; was a mere drill, not planting in check-rows, nor even in hills. Besides, as a machine it was incomplete and unfinished until the alteration which was made in it in 1852, when it was first rendered capable of practical use.

It is urged by the appellees that all those parts of Kirkman's machine which were completed in 1850, and not subsequently altered, should be considered as perfected, although the machine, as a whole, was not perfect and did not subserve the expectation of the inventor until the alterations were made in the seeding apparatus in 1852. It is undoubtedly true that a subsequent inventor could not claim as his original and first invention the separate parts of which Kirkman's machine consisted, and which worked satisfactorily after the machine was perfected. This would prevent the appellant from claiming as his invention the several parts of which Kirkman's machine consisted; but it would not prevent him from claiming such new combination of those parts with devices of his own as would result in a useful and satisfactory machine adapted to the purposes of its construction.

The machines of Job Brown, which are more or less relied on, were all composed of single frames entirely rigid. The machine with one runner, constructed in 1849, was a failure, and is not pretended to have been at all like the appellant's. The machine with two rollers and one large wheel, constructed in 1850, was automatic, could only plant in rows, so as to be worked one way, and failed entirely as a check-row planter. The other machine or machines, constructed in 1850, had rollers, but these did not follow the runners until altered in 1853, and were not used for covering the corn, but for turning a shaft in the hoppers by which the seed was dropped. This is clearly proven and is shown by their thickness, which was little over an inch. They were abandoned for the three-rowed machine without rollers, which was built in 1851, and for which Job Brown applied for a patent in December, 1852. It is apparent that none of these machines anticipated the appellant's machine as containing the particular combination in the claim of the re-issued patent No. 1036.

This patent, therefore, construed and limited
See 35 WALL.

in the manner before stated, we hold to be valid.

The next question is, whether, as thus construed, the patent is infringed by the defendants. It needs but a glance at the defendant, Bergen's, machine, a large model of which is produced in court, to see that it has all the essential characteristics of the appellant's machine. It is a seed-planting machine, made principally of framework, composed of two distinct parts, the front part supported on two runners, or shoes, with upward inclining edges and the rear part supported on two wheels, the latter being arranged to follow the former, and the whole and each part constructed and put together for the purpose and substantially in the manner as is done in Brown's machine, and according to his specification. The only pretense on which it can be claimed to be different, is that the "framework" of which it is constructed is not the kind of framework described by Brown in his specification, namely: "without gearing, without spoked wheels, and other expensive fixtures, and resembling a drag or sled more than it does a carriage or wagon in its main or general construction." By this description, Brown was evidently attempting to show how simply and cheaply the thing could be made, not that it was to be confined to that specific form. It might as well be contended that he intended to confine his invention to wood, and that a machine made of iron or other metal, though made in precisely the same form, would not be an infringement, because it would not have the same quality of cheapness and simplicity which he describes. In fine, we do not understand Brown as limiting his invention to this cheap form, but as showing how cheaply and simply it would bear to be constructed. This, we think, is the fair meaning of his language when taken in connection with the whole specification. A literal construction is not to be adopted where it would be repugnant to the manifest sense and reason of the instrument.

The machine of Selby, which is the subject of the suit of *Brown v. Selby*, in the second case, has all the material features above specified as contained in Bergen's. We have no hesitation in saying that both machines are infringements of the appellant's patent.

The next claim to be considered is that of re-issue 1038. The appellant describes the nature of the invention sought to be secured by that patent as follows:

"The nature of this part of my invention consists in combining with a seed-planting machine constructed principally of frame-work, and with not less than two runners and two wheels, a hinged joint between the point of the tongue and the rear part of the machine (or between what I term its ground supports), so that one part may, by means of said hinge-joint, be raised, lowered, adjusted, or supported on the other part for purposes herein mentioned; meaning by 'one part' and 'the other part' the part in advance and the part in rear of said hinge-joint."

The claim adopts nearly the same language, and is in the following terms:

"What I claim under this patent is, in combination with a seed-planting machine, constructed principally of framework, with not less than

two runners and not less than two wheels, a hinged joint between the point of the tongue and the rear part of the machine, so that one part of the framework may be raised, lowered, adjusted or supported on the other part, substantially as described."

Understanding this claim as applying and confined to a seed planting machine, consisting of two separate parts, with runners under one part, and rollers or wheels under the other, we do not find in any of the machines produced to us this particular feature of the hinged joint in combination with the elements referred to. Kirkman's came the nearest to it, if we should designate as a hinged joint the free connection of his tongue with his machine, which was made by a common bolt between hounds, like those of a wagon. But his machine lacked the elements of the two distinct parts or frames, which are essential in Brown's, and are implied in the claim of this patent. The hinged joint as an element in the combination with which it is connected, and of which it forms a part, is useful and valuable. Without it the machine would lack a very material ingredient of its efficiency and usefulness. The device of connecting and combining it with the two integral parts of the machine, and thus connecting and combining those parts so as to produce a useful effect, is one that may be properly denominated invention, although the hinged joint itself may have existed in other machines which perhaps suggested its use in this. Indeed, the hinged joint, in one form or another, is an old device. It is exhibited in the reaches of a common wagon, whose fore wheels and hind wheels, in passing over inequalities and obstructions, rise and fall independently of each other. But in the corn-planting machine it has two specific and useful effects, namely: in securing the freedom of the runner from needless disturbance from the rear part of the machine, as it pursues its path along the surface, making a furrow of uniform depth, and in enabling the attendant to raise the part containing the runners out of the ground, with ease, by means of a lever resting on the other part.

The appellees insist that this patent attempts to secure an old device merely applied to a new use, and that the supposed new use is analogous to that which the same device subserved in the machine of Remy & Kelly. But we have seen that the machine of Remy & Kelly was a mere experiment, abandoned by the inventors. And the device in question is not claimed as an original invention, nor as an improvement; it is only patented in combination with other material elements of the machine to which it is attached as a part. As an element in that combination alone is it claimed. The combination expressed in the claim, viewed as an entirety and in reference to its purposes and uses, is new, and produces a new and useful result. And it is no objection to the validity of a patent for such a combination that some of the elements of which it is composed are not new.

It is objected to several of the patents under consideration that they do not state what parts of the machine patented are new and what parts are old, and that they are, therefore, void. There is nothing in the patent law which, in terms, requires the patentee to do this. The language of the Act of 1836, under which these patents

were drawn, is, that before any inventor shall receive a patent for his invention or discovery he shall deliver a description thereof, and of the manner and process of making, constructing, using and compounding the same, in such full, clear and exact terms as to enable a person skilled in the art to reproduce it; and the Act directs that the inventor shall "particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery." This, of course, involves an elimination of what he claims as new from what he admits to be old. But what can be a more explicit declaration of what is new and what is old than the summary of the patentee's claim at the close of the specification, if that is made in clear and distinct terms, or in terms so clear and distinct as to be fairly understood. It implies that all the rest is old, or, if not old, that the applicant does not claim it so far as that patent is concerned. If the patentee, by his specification, including the summary claim at its close, points out and distinguishes what he claims as his own invention, it is all that is required. That, if we can find it without difficulty or embarrassment, is what he claims as new; the rest he impliedly, if he does not expressly, disclaims as old. No particular form of words is necessary if the meaning is clear.

These observations apply equally to patents for combinations and patents for improvements. Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device, or part of the machine, this is an implied declaration, as conclusive, so far as that patent is concerned, as if it were expressed, that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for the portions not covered by this; but that will speak for itself. So far as the patent in question is concerned, the remaining parts are old or common and public.

The patents under consideration expressly declare, for the most part, what the patentee claims; generally referring, it is true, to the specification as embodying the substantial form of the invention. Such a reference is proper if it does not introduce confusion and uncertainty, and is often necessary for restraining the too great generality, or enlarging the literal narrowness of the claim.

These remarks apply to re-issue 1038, which we are now considering. We regard it as sufficiently explicit; and we think the patent is valid.

The next inquiry is, whether this patent is infringed by the appellees. It is apparent, on inspection of the models before referred, to that they exhibit every requirement of the patent. They clearly have, "in combination with a seed-planting machine, constructed principally of framework," and consisting of two separate parts, with two runners under one part and two wheels under the other, a hinged joint between the point of the tongue and the rear of the machine, so that one part of the framework may be raised, lowered, adjusted or supported on the other part, substantially as described in Brown's specification. In Selby's machine, it is true, the hinge joint is not located at the same point (the seed boxes) as in Brown's machine,

but is at the front point or toe of the runner. This is not a substantial difference. The office, purpose, operation and effect are the same as in Brown's machine, and a change a little more or less backward or forward does not change the substantial identity of the thing. The same remark applies to the location of the hinge joint in Bergen's machine, which is at the rear part of the front frame.

We do not see how it can be seriously contended that either of the machines is not an infringement of this patent.

Re-issue 1039 contains two claims, as follows:

"What I claim under this patent is a seed planting machine, wherein the seed dropping mechanism is operated by hand or by an attendant, in contradistinction from 'mechanical dropping,' the mounting of said attendant upon the machine, in such a position that he may readily see the previously made marks upon the ground, and operate the dropping mechanism to conform thereto, substantially as herein set forth.

I also claim, in combination with a seed-planting machine, composed substantially of framework, and upon which the person who works the seed-slides or valves sits or stands, a lever or its equivalent, by which a driver or second attendant may raise or lower that part of the framework that carries the attendant and the seeding devices, and thus ease the machine in passing over intervening obstacles or in turning around, substantially as described."

The first of these claims, if construed simply as claiming the placing of the seed-dropper on the machine, would probably be void, as claiming a mere result, irrespective of the means by which it is accomplished. But if construed as claiming the accomplishment of the result by substantially the means described in the specification, it is free from that objection; and we ought to give a favorable construction, so as to sustain the patent if it can fairly be done. By reading the claim in connection with the final qualifying clause, thus, "the mounting of said attendant upon the machine, etc., substantially as herein set forth," the fair construction would seem to include the means and manner of placing him upon the machine. This view is corroborated by reference to the body of the specification. "To enable others skilled in the art," says the patentee, "to make and use this invention, I will proceed to describe the same, with reference to the drawings." He then gives a detailed description of the seat or platform and its relation to the other parts, and the mode of occupying and using the same. Construing the claim in this manner, is it, then, a valid claim?

The only device of a similar character at all competing with it in the matter of time, was that used by Job Brown, in his machines constructed or altered in the spring of 1851, the same spring in which the appellant's machine was made. Which was first made, it is impossible for us from the evidence to tell. Job Brown, as well as the applicant, applied for a patent for one of his machines having the arrangement of a seat for the dropper. A patent was granted to the appellant, and none was granted to Job Brown. The Patent Office subsequently amended the appellant's patent so as to include a claim for this very thing in question. Under these circumstances, in the absence of conclusive

evidence to the contrary, the presumption is in favor of the appellant. The burden of proof is on the party who sets up the objection of "prior use" against the patent.

The second claim is for a combination, embracing, as one of its elements, the arrangement or seat for the dropper last described; and if that was new, this combination must also be new. And, indeed, we shall look in vain in any previous machine for the lever here described in the combination with which it is associated. Standing by itself, the lever as well as the hinged joint was exhibited in the experimental machine of Remy & Kelly. But as, in our view, that machine was never brought into successful operation until after Brown's invention was completed, we do not regard the fact referred to as seriously affecting the question. The particular combination described by the patent under consideration is new, and the claim is valid.

This is the proper place, however, to notice an objection made against the three patents conjointly, namely: re-issues 1036, 1038 and 1039. It is contended that they are for substantially the same combination. We do not think that this is the fact. We regard the re-issue 1036 as a patent for the corn-planting machine in outline, comprising its most essential elements, namely: constructed principally of framework "substantially as and for the purpose set forth" in the specification; containing the two frames or parts, loosely or freely connected; one supported by the runners, the other by the wheels following them, each having its distinct purpose as indicated; and the seeding apparatus being arranged for planting in check-rows, whether automatically or by hand, the method of each being shown in the specification. This patent does not call for a hinged joint with its particular appliances, or for a particular arrangement of seat or location for the dropper. Re-issue 1038 is for a different combination, including the separate parts or frames, the runners, the wheels, and lastly the hinged joint so arranged that one part of the framework may be raised and lowered on the other part. Re-issue 1039 claims, first, a seat or platform for the dropper, on the machine, so that he may watch the cross-rows and plant by them; secondly, in addition thereto, the particular device of the lever, by which the driver may raise or lower the framework that carries the dropper.

This view of the relative objects of the three patents, as we think, shows that they are not obnoxious to the objection raised.

Having already examined the question of infringement as it respects re-issues 1036 and 1038, it remains to inquire whether the appellants have infringed re-issue 1039. Of this there can be no doubt. In both of their machines the dropper is mounted on the machine on a seat or platform arranged for that purpose, so as to observe the cross-rows, and drop by them; and in both, levers are used (not precisely in the form of Brown's, but equivalent thereto, and substantially the same), by which the driver may raise or lower that part of the framework that carries the dropper and the seeding devices. In Bergen's machine, this lever is the rear frame itself, which is hinged to the rear part of the seeding-frame, and is operated by the driver by tilting it back and forward by his own weight.

It is unnecessary to examine re-issue 1040, as

there is no pretense that the appellees have infringed that patent.

The second group of re-issues is next to be considered.

The first, No. 1091, after describing the entire machine as finally perfected by Brown, prior to the issue of his second patent, May 8, 1855, has the following claims:

"First. In combination with a seed-planting machine that is operated by hand, the placing of both the driver and the person who operates the seed-slides or valves, upon the machine, in such position as that each may attend to his particular duty without interfering with that of the other, substantially as described.

I also claim, in combination with a seed-planting machine, that is operated by hand, and upon which the driver and the person who works the seed-slides or valves sit or stand, the so locating of said seats or stands, as that the weight of one of the persons may be used to counterbalance or overbalance the weight of the other, for the purpose of more readily raising or lowering the seeding apparatus, substantially as and for the purpose described."

These claims are analogous to those of re-issue 1089, and the first is anticipated by the machines of Job Brown, constructed and altered in the spring of 1851. It is not pretended that the appellant placed both attendants on his machines until the spring of 1853, when he placed the driver's seat, as well as the dropper's, on the twelve machines which he manufactured and sold at that time.

The second claim is for the relative location of the seats for the driver and operator, such that one of them may overbalance the weight of the other, and thus more readily raise or lower the seeding apparatus. The claim is made only in reference to machines operated by hand, on which both driver and operator sit or stand. The seats themselves can be of little consequence in this combination. The relative location of the attendants is the material thing.

The process of tilting the frame of a seed-planter on the wheels as a fulcrum, by shifting the weight of the driver standing or sitting thereon, was exhibited in Kirkman's machine, in the spring of 1852, and in Farley's model, made in January, and publicly deposited in the Patent Office in February, 1853.

The appellant does not fix the date of his alleged improvement earlier than the 20th of April, 1853, it being first introduced into the twelve machines built in that year. He was anticipated, therefore, by Kirkman and Farley, so far as their machines were identical with his. They do not come within the literal terms of his claim which refers the improvement only to machines operated by hand, and on which the operator is carried. Kirkman and Farley had no operator and, of course, had none on their machines. Was this difference material? The device was not altered by Brown substantially, in form, operation or purpose. The only difference was the presence of the dropper on the machine, making a greater weight to be raised than existed before, and applying it to a check-row corn planter. It seems to us that it was simply the application of an old device to a new use.

We are of opinion, therefore, that re-issue 1091 is void.

The claim of re-issue 1092 is as follows:

"What I claim under this patent is: in combination with a seed-planting machine, operated by hand, and having its seeding devices forward of the center of the wheels, and forward of the driver's seat and a hinged connection, the locating of the seat in such relation to a line drawn through the centers of the wheels or ground-supports, as that the occupant of said seat may, by moving himself, or throwing his weight forward or backward on his seat, without the necessity of rising, walking or standing over or near the seeding devices, force the seeding apparatus into or raise it from the ground substantially as described."

After a careful consideration of this claim, we are brought to the conclusion that the subject of it is not patentable. Prior inventions having placed the driver on the machine, and having constructed the platform in such manner that his movement backward or forward would raise or lower the seeding apparatus, and the seat itself not being claimed as new, it can hardly be contended that the proper location of the seat for effecting the same object, required the exercise of inventive power.

The next patent, re-issue 1093, after describing the machine as before, with its runners and front frame, its wheels and rear frame, its seat for the driver over the wheels, and contrivance for raising and lowering the front frame, its seat for the dropper over the runners, its hinged joint, etc., concludes as follows:

"There are two points in this machine that have unvarying positions or heights with regard to the ground, viz.: the point of the tongue, as its height is defined by horses' necks, to which it is attached, and they standing of course upon the ground, and the journals or axle of the covering or supporting wheels F F, as they roll on the ground, and between these fixed points, the hinged connection between the front and rear part of the machine, is made so as to admit of raising or lowering the seeding devices.

Having thus fully described the nature and object of this part of my invention, what I claim under this patent is, in combination with a seed-planting machine that has a hinged or yielding joint between its fixed points of support, and with its seeding devices between said points, the so connecting of the parts between said fixed points of support as that that portion of the machine carrying the seeding devices may be raised up out of the ground by the attendant riding on the machine, and be carried by the tongue or horses' necks, and the supporting wheels, substantially as and for the purpose described."

The precise thing claimed here, after defining the combination of which it is to form a part, is, "the so connecting of the parts" as to produce the result mentioned, "substantially as and for the purpose described." If this means to include any and every connection of the parts which will produce the result "substantially as described" (which result is to enable the attendant, riding on the machine, to raise that portion of the machine carrying the seeding devices out of the ground so as to be carried on the horses' necks and the wheels), then the claim was anticipated by Kirkman, for the connection of the parts in his machine enabled the attendant, riding on the machine,

to raise the front part which carries the seed-ing apparatus, out of the ground, when it would be suspended on the horses' necks and the wheels; and he had a hinged joint between the fixed points of support. The same might be said of the machine of Remy & Kelly, if it were to be taken into consideration in determining this question. But if the claim is to be construed as limited to the mode of connecting the parts in the appellant's machine (being a hinged connection between the two frames and, therefore, different from Kirkman's machine), and to the means by which the final result was accomplished, namely: by the shifting of the driver's weight on the machine, and, therefore, different from Remy & Kelly's, then this objection would be obviated. But thus modified, it would substantially correspond with re-issue 1038, being simply for a mode of doing that, with the driver on the machine, which was done before, under 1038, with the driver on the ground, employing only in addition the mode of operation used by Kirkman. In other respects the two combinations would be precisely the same.

We are of opinion, therefore, that this patent cannot be sustained.

The next patent, re-issue 1094, is for a matter too frivolous to form the subject of invention. It is simply for a peg or stop to prevent the rear part of the machine from tipping so much as to dump the driver onto the ground. No mechanic of any skill would construct a machine of the character described without providing some such arrangement. This patent is not sustained.

The latest patent of the series, re-issue 1095, is for a peculiar valve in the tube through which the seed is dropped to the ground, called the flipper-valve. When the machine is in motion, the time taken for the seed to drop from the hopper to the ground, supposing it to drop from a height of only 18 or 20 inches, would carry it forward more than a foot after its discharge, and thus carry it beyond the cross row. It became important, therefore, to drop the seed from a point near the ground, or from the bottom of the tube instead of the hopper, at each movement of the lever by the operator. To do this required two movements; one for dropping the seed from the hopper into the tube; the other for dropping it from thence to the ground. By the device described in this patent, which was noticed at the commencement of this opinion, both of these movements of the seed take place at the same instant and by one movement of the hand; the seed for one hill being dropped into the ground at the same time that the seed for the next hill is dropped into the tube.

The claim of the patent is in the following words:

"Having thus fully described my invention, what I claim under this patent, is so combining with a lever, by which both may be operated, a valve or slide in the seed-hopper and a valve in the seed-tube, as that a half motion of the lever by the operator riding on the machine, by which they are operated, shall both open and close the seed passages at regular periods, and pass measured quantities only, substantially as described."

As before stated, the mode by which this was effected was by placing in the seed-tube a long,

slender valve composed of a slip of metal suspended on a pivot in the middle, so that when one end was pushed forward the other end would be pushed backward. In this way each movement of the upper extremity would let a charge of seed into the tube on one side and keep it there, whilst the simultaneous movement of the lower extremity would discharge the previous charge on the other side.

The appellees endeavored to show that this apparatus was anticipated by the inventions of Charles Finn and Jarvis Case, before mentioned. Finn says that he invented his machine in the summer or fall of 1851. The seed-dropping apparatus consisted of a vibrating side or back to the seed-tube, which required two movements, one backward and the other forward, for dropping each hill of corn, alternately opening and closing the tube. It was operated by levers in connection with the valves in the hoppers. But each hill or check-row required one movement of the lever to let the seed into the tube and a reverse movement to let it out. And this double movement was repeated at every check-row. Whereas, by Brown's apparatus, both results were accomplished by a single movement; a forward movement effecting a dropping for one check-row and a backward movement effecting it for the next. It is evident that, although there was a similarity between the two processes, they were essentially different. It may be that Brown's is only an improvement on the process used by Finn. If this be so, still it is only the improvement (that is, the machine as he uses it) that he claims by his patent.

The machine of Case, which he swears he constructed in March, 1853, is still more unlike Brown's in form, though less unlike in operation. It has two independent valves, one in the hopper to let the seed into the tube, and one at the bottom of the tube to let it out. These two valves are so connected by a chain or string that both are opened at once. A spring is arranged to shut them as soon as possible, so as to prevent the seed admitted above from escaping below until the next movement of the lever. This apparatus, it is true, requires but one movement of the hand for each dropping, the spring performing the other. But the spring has to be drawn by the force of the hand so as to have the necessary recoil. The same strength has to be exerted by the operator as if he made both movements with his hand. It is evident that this device is also different from the appellant's. The two have similarities, but they are essentially distinct machines.

But it is insisted that Brown, in 1860, admitted in a newspaper article that the process in question was old. We have examined the article and, according to our construction, his declaration amounted, in substance, to nothing more than that the principle of the double drop was old, which was probably true; and that Case's application of it was old, which may or may not be true; but it does not contain or amount to an admission that his own peculiar process was old.

We think, therefore, that this patent must be sustained.

The last patent is clearly infringed by the Selby machine. The flipper-valve and mode of

operating it are almost precisely the same.

In the case of the Bergen machine, it is contended that no lever is used for moving the connecting rod backward and forward between the hoppers. A fixed perpendicular handle is used instead of a lever. The question is: whether that is such an alteration as to change the character of the combination. The object in view is to put into the hand of the operator something by which he can move the connecting rod and, consequently, open the valves, the instant he comes to the cross-row. It is of no consequence in the world whether the cross-bar moves in the same direction with his hand or in the reverse direction. A lever working on a pivot or fulcrum between the hand and the connecting rod, would cause the latter to move in the reverse direction to that of the hand; a lever working on a pivot or fulcrum below or beyond the connecting rod, would cause the latter to move with the hand; so would a lever or handle firmly fixed to the rod. The claim is for "a lever or its equivalent," in combination with other things. Whilst, in most cases, a mere handle is not the equivalent of a lever, because not capable of performing the same functions, in this case it is an equivalent because it does perform precisely the same function in substantially the same way.

In our judgment, both machines are an infringement of the patent.

We have thus, with perhaps unnecessary detail, gone over and considered the various questions and points raised in these cases. The result is that the re-issued patents, numbered respectively 1036, 1088 and 1089 of the first series and 1095 of the second series, are sustained as good and valid patents, and that the appellees are infringing the same.

The decrees of the Circuit Court in these cases must be reversed and the causes remanded, to be proceeded in according to law.

Mr. Justice Clifford, dissenting:

Applicants for a patent are required to file in the Patent Office a written description of their invention, and of the manner and process of making, constructing and using the same, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct and use the same; and in the case of a machine, he must explain the principle thereof and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions. Patents granted without a compliance with those conditions are invalid, as the express requirement of the Act of Congress is that every inventor or discoverer shall do so before he shall receive a patent for his invention or discovery. 16 Stat. at L., 201.

Letters patent were granted to the complainant on the 2d of August, 1858, to take effect from the 2d of February prior to the date of the patent. Seed-planter is the name of the invention given in the patent, but in the introductory part of the specification it is denominated "new and useful improvements in seed-planters for planting corn and smaller grains." Very minute description is given of the machine and of the several devices of which the machine is composed, for the declared purpose

of enabling others skilled in the art to make and use the invention. Suffice it to say, without entering into details, that of all the numerous devices described as ingredients of the machine not one of them is new, nor is it claimed that the patentee either invented the machine or any one of the ingredients of which it is composed. What he claims in that patent is as follows: (1) The oscillating horizontal wheels or distributors in the bottom of the hopper, having slots and tubes of various sizes, in combination with the stationary caps and pins for the discharge of different kinds and qualities of seeds. (2) He also claims the arrangement of the covering rollers, mounted as described, and performing the functions of covering the seed, elevating the cutters in turning the machine, and also in adjusting the cutters to different depths.

Tested by the descriptive portion of the specification the better opinion is that the second claim is also for a combination; but in the view taken of the case it is unimportant whether it be regarded as a method of accomplishing the described result or as a combination of the described ingredients to effect the same end, as it is quite clear that the patentee does not claim that he is the original and first inventor of any one of the several devices of which the entire machine is composed. Beyond all doubt the invention consisted of the two combinations described in the respective claims, and it is equally certain that the letters patent were in all respects sufficient to secure the full enjoyment of the patented machine to the patentee. Nevertheless, the patentee surrendered the same, and on the 16th of February, 1858, the same was re-issued to him with amended specification which contains only one claim. Instead of claiming a combination of old ingredients, as in the original patent, he claimed in the re-issued patent a shoe for opening a furrow, which has a convex edge in front and a seeding tube in its rear end, so that it may cut through any grass, open out a furrow and hold it open until the seeds are deposited in the same, substantially as set forth in the specification.

Like the original patent the re-issued patent was in form both operative and valid; but, inasmuch as it was not sufficiently comprehensive to supersede all other improvements, the patentee surrendered it for a second time and caused the original invention to be re-issued in five parts, embracing several claims, all of which except one are involved in the present action.

Surrendered patents cease to be a cause of action from the moment the surrender takes place, nor can the owner of the patent recover, even for an infringement which preceded the surrender, unless the claim for profits or damages had passed into judgment before the surrender took place. Such a patent, though inoperative as a cause of action, may be admitted as evidence to support or disprove an issue that the re-issued patent is not for the same invention as the original. Reference may also be made to such patent, as to a repealed statute, to aid in the construction of a re-issued patent, if the latter is ambiguous, but it ceases to be operative for any other purpose just as much so as a repealed statute, and can never have the effect to enlarge or diminish the operative words of a re-issued patent.

Patents are public grants, and every person claiming any right under such an instrument must show that the right claimed is secured by the instrument; nor can he be benefited by showing that the right claimed was secured by a surrendered patent, unless the re-issued patent also secures the same.

Viewed in the light of these suggestions, it is clear that the rights of the complainant in this case depend solely upon the last-mentioned re-issued patents, which are the patents mentioned in the bill of complaint, and which, it is alleged by the complainant, that the respondents have infringed.

Defenses of various kinds are set up by the respondents to the allegations of the bill of complaint, as follows: (1) That the complainant is not the original and first inventor of the improvements described in the said several patents mentioned in the bill of complaint. (2) They deny that the said new patents were issued in good faith, and they allege that said re-issued patents are not for the same invention as that described and embodied either in the original patent or in the prior re-issues of the original patent. (3). That the five last mentioned re-issued letters patent are severally invalid in law and void and of no effect, and that they do not confer any such right or monopoly to the complainant as he alleges and pretends to claim.

Enough has already been remarked to show that the original patent was a combination of old ingredients by which the described result was effected; or, in other words, that the patented invention consisted in a new combination of the described ingredients, every one of which was proved to be old. Old ingredients are not the proper subjects of letters patent in any other form than as a combination, for the plain reason that nothing is the proper subject of a patent which is not both new and useful.

Re-issued patents must be for the same invention as the original, and that condition is just as applicable to a second re-issue as to the first; nor is the second re-issue relieved in any respect from the full force of that condition in a case where the invention in the re-issue is divided into several parts.

Undoubtedly, a new and useful combination consisting of old ingredients may be the proper subject of letters patent, if the combination produces a new and useful result; but the Act of Congress does not authorize the patentee to surrender such a patent and to re-issue the same for the separate ingredients, for the plain reason that the ingredients are old, and for the additional reason that a patent for a separate ingredient is not the same as the combination of several ingredients. *Gould v. Rees*, 15 Wall., 194 [82 U. S., XXI., 41].

Authorities to support these propositions are unnecessary as they are self-evident; nor is it necessary to do more than to refer to the several claims of the several re-issues under consideration to show that every one of those re-issues are invalid, both for the reason that the alleged improvement is old, and also for the reason that the invention embodied in each of the re-issued patents is different from the one secured by the original patent. Even the court here admits that each one of those

re issues is "for a distinct and separate part of the original invention alleged to have been made by the complainant," full proof of which is exhibited in the claims of the respective re-issued patents *Gill v. Wells*, 22 Wall., 1 [89 U. S., XXII., 499]. They are as follows:

1. No. 1036.—Appended to that patent is a claim much more comprehensive than is to be found in either of the four other patents, but it is plainly not a claim for a combination, nor one for the whole machine, as was admitted in argument by the complainant. What he there claims is a seed-planting machine constructed principally of framework, the front part of which is supported on not less than two runners, or shoes, with upward inclining edges, and the rear part is supported on not less than two wheels, the latter being arranged to follow the former.

Evidently that claim is not intended to cover the whole machine; nor would it benefit the complainant even if it could receive that construction, as it is not pretended that he was the original and first inventor of such a planting-machine, nor that the specification of the original patent professed to describe such an original invention. Machines of the kind have existed for a very long period before the date of the complainant's patent, even for a period whereof the memory of man runneth not to the contrary.

2. No. 1037.—Nothing is claimed in this patent except the construction of a shoe or runner for a seed-planting machine, with an upward inclining edge, with its point sufficiently raised so that it will climb up and over, or cut and break through intervening obstacles without materially forcing the earth laterally at its front part, and widening towards the rear end so as to open a furrow in which the seed to be planted may be deposited, and long enough to furnish a support to the framework of the machine. Explanations of that patent are certainly unnecessary, as it is plain that the claim is for distinct and separate ingredients of the combination embodied in the original patent.

3. No. 1038.—Under this patent the complainant claims a hinged joint between the point of the tongue and the rear part of the machine in combination with a seed planting machine, so that one part of the framework may be raised, lowered, adjusted and supported on the other part. Nor is any argument necessary to show that the claim of the patent is for one of the separate and distinct ingredients of the combination embodied in the original patent, all of which were confessedly old.

4. No. 1039.—Two claims are made in this patent as follows: (1) The seat for the attendant, or, in the language of the claim, the mounting of the attendant upon the machine or seed-planter, wherein the seed dropping mechanism is operated by hand, in such a position that he may readily see the previously made marks upon the ground, and operate the dropping mechanism to conform thereto. (2) He also claims a lever, in combination with a seed-planting machine, or its equivalent, by which the driver or second attendant may raise or lower that part of the framework that carries the attendant and the seeding devices.

Manifestly the lever or its equivalent is the principal subject-matter of that claim, refer-

ence being made to certain other parts of the seed-planter merely as a means of describing the functions to be performed by the lever, and the results to be attained by its use; nor does it require any argument to show that the lever is old, as it is matter of common knowledge that it was well known long before the original patent of the complainant was issued.

5. No. 1040.—Two claims are also made by the patentee in this patent: (1) He claims a pair of auxiliary wheels and an axle, in combination with the seed-planting machine, carried mainly upon not less than two runners and two covering-wheels, for the double purpose of taking a portion of the weight off from the runners and the other wheels, and for affording means of readily converting the machine from a hand-planter to an automatic seed-sower. (2) He also claims hanging the axle of the auxiliary wheels in hinged or adjustable arms or levers, so that more or less of the machine may be placed upon the auxiliary wheels.

All necessity for any remarks upon those claims is superseded by the admission that they are not infringed by the respondents.

Four of the five re-issues are included in the charge, and the complainant also charges that the respondents have infringed five other re-issued patents held by him, which also secure to him the exclusive right to the respective improvements therein described, all of which appertain to the same machine for planting corn and smaller grains.

Reference will first be made to the original patent from which those several re-issues are derived. Like the preceding re-issued patents, these were all derived from a single original patent, issued May 8, 1855, as appears by the record, which it is claimed is an improvement upon the prior original patent.

Doubtless the patentee made some change in the original machine, as appears by the descriptive portion of the specification; as, for example, he enlarged the rollers, increased the length of the side-pieces, connected those pieces by cross-pieces, and constructed the frame in two parts, denominated front and rear, placing the long seat for the driver on the front end, in order that he may slide forward or back, to tilt the machinery when necessary to deepen the furrow, or to raise the front of the shoes from the ground, as occasion calls for such a movement; but he invented no new ingredient or device, nor did he introduce any element into the machine which was not previously well known, all of which will sufficiently appear from the claim when compared with the drawings, without reproducing the details of the specification annexed to the patent. It contains but a single specification in that regard, which, in substance and effect, is as follows: what he claims is the runners, with their valves, in combination with the hoppers and their plates, together with the adjustment of the valves by means of levers and cams, and the driver's weight, for the purpose of carrying and dropping seeds by each vibration of the lever, and to regulate the depth of the planting.

Tested by the description contained in the specification, it is not doubted that the patent was a valid one for the described combination, which, beyond all doubt, is composed of old ingredients. Regarded as an invention for a

combination it may be regarded as an improvement upon the original invention described in the first-mentioned patent, but it is quite clear that it contains no devices except such as had long before been well known to mechanics.

Though operative and valid, still it was not satisfactory to the complainant, because not sufficiently effective to shut out other improvements for planting seeds. Accordingly, on the 10th of November, 1857, he surrendered the patent, and the same was, on the same day, re-issued to him with a single claim, as follows: he claims the locating the seat for the driver in the rear of the supporting axle in combination with the hinged frames or hinged joint, so that as the driver moves forward or back, on his seat, the rear frame may act as a lever for lowering or raising the seed part of machine, and thus throw it into or out of the ground, as circumstances may require.

Probably it would be difficult to frame a claim which would more exactly embody the true nature of the actual improvement, but still it was not satisfactory to the complainant, and on the 11th of December, 1860, he surrendered the patent, and the same was re-issued to him in five separate patents, as follows:

1. No. 1091.—Two claims are contained in this patent as follows: (1) The placing of both the driver and the person who operates the seed-slides or valves, in such a position on the seed-planter that each may attend to his particular duty without interfering with that of the other. (2) The so locating the seats or stands for those persons, in combination with the machine, that the weight of one of the persons may be used to counterbalance or overbalance the weight of the other, for the purpose of more readily raising or lowering the seeding apparatus.

2. No. 1092.—He claims in this patent the locating of the seat in the machine in such relation to a line drawn through the center of the wheels or ground supports that the occupant of the seat may, by moving himself or throwing his weight forward or backward on his seat, without the necessity of rising, walking or standing over or near the seeding devices, force the seeding apparatus into or raise it from the ground.

3. No. 1093.—His claim in this patent is the so connecting of the parts between the fixed points in the described machine, that the portion of it carrying the seeding devices may be raised up out of the ground by the attendant riding on the machine and be carried by the tongue or horses' necks and the supporting wheels.

4. No. 1094.—Wherein he claims a lock-block or stop, in combination with the machine, which prevents the rear part of the frame from descending so low as to strike the ground or inconvenience the occupant of the seat upon the rear portion of the frame.

5. No. 1095.—His claim in this patent is for a valve or slide in the seed-hopper and a valve in the seed-tube, so combining with a lever operating both, that a half-motion of the lever by the operator riding on the machine, shall open and close the seed-passages at regular periods and pass only the right quantities.

Most of these ten re-issued patents are for a single ingredient of the combinations described in the two original patents, and every one of the others is for a separate and distinct part of one or the other of those combinations; and the

rule of decision set up by the complainant is, that he may mass these several patents just as if the several ingredients were all described in one patent embracing a claim for a combination of each and every of the respective ingredients included in these ten several patents. Such a theory, in my judgment, is simply absurd, and it is certain that it finds no support in any decided case nor in any treatise upon the rules and practice in patent cases.

Argument to show that such is the theory of the present suit is scarcely necessary, as it is plainly shown in that part of the bill of complaint which alleges that the improvements and inventions contained in those several letters patent constitute separate parts of an entire machine for seed-planting, and that they may be constructed for use and used in one machine in that department of agriculture; and the complainant charges that the respondents have constructed machines and used the same, and vended the machines to others to be used, in imitation of all those improvements and inventions except the improvement described in the re-issued patent No. 1040, which it is admitted is not infringed by the respondents.

All the ingredients described in those ten re-issued patents are old, and it was admitted at the argument that no one of the patents contains a claim for a combination of the several ingredients described in the said several re-issued patents, and that the case rests on the basis that the several claims or some of them are valid though not amounting to a combination.

Valid patents may be granted for a new combination of old ingredients, provided it appears that the new combination produces a new and useful result; but the invention in such a case consists entirely in the new combination, and any other party may, if he can, make a substantially different combination of the same ingredients, or he may use any number of the ingredients less than the whole, for the reason that the monopoly of the patent extends only to the combination and not to the ingredients separately

considered. *Vance v. Campbell*, 1 Black, 428 [66 U. S., XVII., 171]; *Prouty v. Ruggles*, 16 Pet., 341.

Patents may also be granted for a machine or for a separate and distinct device, but it cannot be held that such a patent is valid unless it be proved that the patentee is the original and first inventor of the thing patented. *Seymour v. Osborne*, 11 Wall., 516, 555 [78 U. S., XX., 88, 42].

None of the separate devices patented in those re-issued patents are new, and it being conceded that no one of the patents contains any such combination as that embodied in either of the original patents, it is clear in my judgment that the decree of the circuit court should be affirmed unless the theory that these several patents can be massed and be by judicial construction converted from patents for separate and distinct ingredients into one patent for a combination of all the ingredients described in the several patents mentioned in the bill of complaint.

Courts of justice cannot accomplish such an object by construction nor in any other mode, for several reasons: (1) Because the province of construction is restricted to the ascertainment of the meaning of the language employed in the grant. (2) Because the object can only be accomplished by the surrender of these patents and by a re-issue of the original patent, which is a matter within the exclusive jurisdiction of the commissioner. (3) Because each of these patents is a separate and distinct grant. (4) Because the court in construing such a grant is restricted to the language employed by the granting power. (5) Because several patents for several separate and distinct devices do not in law amount to a patent for a combination and, therefore, cannot so be declared by a court of justice.

Mr. Justice Miller and Mr. Justice Davis concur in this dissent.

Cited—10 Biss., 231; 14 Blatchf., 304, 305; 15 Blatchf., 165; 17 Blatchf., 155, 156.

CASES

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IN THE

SUPREME COURT

OF THE

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1875.

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THE DECISIONS OF THE Supreme Court of the United States,

AT
OCTOBER TERM, 1875.

WILLIAM J. McCOMB, Surviving Executor of **ROBERT McCOMB**, Deceased, *Plf. in Err.*,

v.
THE COUNTY COMMISSIONERS OF KNOX COUNTY, OHIO.

(See S. C., 1 Otto, 1, 2.)

State judgment, when reviewed—inferior state court.

1. A judgment of the highest court of a State, of reversal only, and sending to a lower court for further proceedings, is not a final judgment, and cannot be reviewed by this court.

2. The final judgment of the State Court of Common Pleas which was, when rendered, open to review by the State Supreme Court, is not the final judgment of the highest court in the State in which a decision in the suit could be had, and cannot be reviewed by this court.

[No. 4.]

Submitted Oct. 12, 1875. Decided Oct. 25, 1875.

IN ERROR to the Court of Common Pleas for the County of Richland, State of Ohio.

The case is stated by the court.

Mr. W. H. Smith, for defendants in error:

Mr. A. G. Thurman, for plaintiffs in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The Commissioners of Knox County having sued **McComb** in the Court of Common Pleas

suggestion by **McComb** that he might ask leave to amend his answer, the cause was remanded "for further proceedings according to law." Upon the filing of the mandate in the Common Pleas, that court, in accordance with the decision of the Supreme Court, overruled the demurrer to the replies, and sustained that to the answer. **McComb** did not ask leave to amend his answer, but elected to rely upon his defense, as already stated. Thereupon the court gave judgment against him upon the case made by the petition.

This writ of error is prosecuted to reverse that judgment.

The Court of Common Pleas is not the highest court of the State; but the judgment we are called upon to re-examine is the judgment of that court alone. The judgment of the Supreme Court is one of reversal only. As such, it was not a final judgment. *Parcells v. Johnson*, 20 Wall., 658 [87 U. S., XXII., 410]; *Moore v. Robbins*, 18 Wall., 588 [85 U. S., XXI., 758]; *St. Clair v. Livingston*, 18 Wall., 628 [85 U. S., XXI., 818]. The Common Pleas was not directed to enter a judgment rendered by the Supreme Court and carry it into execution, but to proceed with the case according to law. The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the Common Pleas to permit the parties to make a new case by amendment. In fact, the cause was sent back for further proceedings because of the suggestion by **McComb** that he might want to present a new defense by amending his answer.

The final judgment is, therefore, the judgment of the Court of Common Pleas, and not of the Supreme Court. It may have been the necessary result of the decision by the Supreme Court of the questions presented for its determination; but it is none the less, on that account, the Act of the Common Pleas. As such, it was, when rendered, open to review by the Supreme Court, and for that reason is not the final judgment of the highest court in the State in which a decision in the suit could be had. R. S., sec. 709.

The writ is dismissed.

Cited—88 U. S., 179; 94 U. S., 617; 104 U. S., 4.

THE WILMINGTON AND WELDON
RAILROAD COMPANY, *Plff. in Err.*,

v.
HENRY KING, *Exr. of HARDY KING, De-*
ceased.

1(See S. C., 1 Otto, 3-7.)

Contracts in Confederate States, when valid—evidence of value of Confederate currency—North Carolina statute impairs obligation of contracts—damages.

*1. Contracts made during the war, in one of the Confederate States, payable in Confederate currency, but not designed in their origin to aid the insurrectionary government are not, because thus payable, invalid between the parties.

2. In actions upon such contracts, evidence, as to the value of that currency at the time and in the locality where the contracts were made, is admissible.

3 A Statute of North Carolina of March, 1866, enacting that, in all civil actions "for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract, and that the jury, in making up their verdict, shall take the same into consideration and determine the value of said contract in present currency in the particular locality in which it is to be performed, and render their verdict accordingly," in so far as the same authorizes the jury in such actions, upon the evidence thus before them, to place their own estimate upon the value of the contracts, instead of taking the value stipulated by the parties, impairs the obligation of such contracts, and is, therefore, within the inhibition upon the State of the Federal Constitution. Accordingly, in an action upon a contract for wood sold in that State during the war, at a price payable in Confederate currency, an instruction of the court to the jury, that the plaintiff is entitled to recover the value of the wood without reference to the value of the currency stipulated, was erroneous.

[No. 9.]

Submitted Oct. 12, 1875. Decided Oct. 25, 1875.

IN ERROR to the Supreme Court of North Carolina.

King sued the R. R. Co. in the Supreme Court of Wilson Co., North Carolina, to recover the agreed price for certain cords of wood sold and delivered by the plaintiff's testatrix to the defendant at the agreed price of \$1 per cord, part of it July 18, 1864, and part of it Jan. 1, 1865.

The defendant, in its answer, admitted the agreement and the delivery of the wood, but set up in defense that the price agreed was payable in Confederate currency, and insisted that the agreed amount was subject to be scaled by the value of the currency at that time.

At the trial the defendant asked the court to instruct the jury that the plaintiff was entitled only to receive the value of the currency and not of the wood. The plaintiff, on the other hand, asked the court to instruct the jury that the plaintiff was entitled to recover the value of the wood; and the court refused the instruction asked by the defendant and instructed the jury as prayed by the plaintiff.

On appeal to the Supreme Court of the State, the judgment was affirmed.

*Head notes by *Mr. Justice FIELD*.

NOTE.—Contracts payable in Confederate notes; tender of. See note to *Thorington v. Smith*, 75 U. S., XIX., 361.

Assignment of error is that the Supreme Court of N. C. erred in sustaining the instructions given by the county court, and in thus deciding in favor of the validity of the Act of Assembly of Mar. 12, 1866.

Messrs. J. M. Carlisle and J. D. McPherson, for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Justice Field delivered the opinion of the court:

The contract between the defendant and the plaintiff's testatrix, upon which the present action was brought, was made in North Carolina during the war. By its terms, the wood purchased by the Railroad Company was to be paid for in Confederate currency. Contracts thus payable, not designed in their origin to aid the insurrectionary government, are not invalid between the parties. It was so held in the first case in which the question of the validity of such contracts was presented—that of *Thorington v. Smith*, 8 Wall., 1 [75 U. S., XIX., 361]—and the doctrine of that case has been since affirmed in repeated instances. The treasury notes of the Confederate Government, at an early period in the war, in a great measure superseded coin within the insurgent States and, though not made a legal tender, constituted the principal currency in which the operations of business were there conducted. Great injustice would, therefore, have followed any other decision invalidating transactions otherwise free from objection, because of the reference of the parties to those notes as measures of value. See, *Hanauer v. Woodruff*, 15 Wall., 448 [83 U. S., XXI., 227]; and the *Confederate Note Case*, 19 Wall., 556 [86 U. S., XXII., 199].

But as those notes were issued in large quantities to meet the increasing demands of the Confederacy, and as the probability of their ultimate redemption became constantly less as the war progressed, they necessarily depreciated in value from month to month, until in some portions of the Confederacy, during the year 1864, the purchasing power of from twenty-one to upwards of \$40 of the notes equaled only that of \$1 in lawful money of the United States. When the war ended, the notes, of course, became worthless, and ceased to be current; but contracts made upon their purchasable quality existed in large numbers throughout the insurgent States. It was, therefore, manifest that, if these contracts were to be enforced with anything like justice to the parties, evidence must be received as to the value of the notes at the time and in the locality where the contracts were made; and, in the principal case cited, such evidence was held admissible. Indeed, in no other mode could the contracts as made by the parties be enforced. To have allowed any different rule in estimating the value of the contracts, and ascertaining damages for their breach, would have been to sanction a plain departure from the stipulations of the parties, and to make for them new and different contracts.

In the case at bar, the State Court of North Carolina declined to follow the rule announced by this court, and refused to instruct the jury that the plaintiff was entitled to recover only the value of the currency stipulated for the wood sold, and instructed them that he was en-

titled to recover the value of the wood, without reference to the value of that currency. This was nothing less than instructing them that they might put a different value upon the property purchased from that placed by the parties at the time. In this ruling the court obeyed a statute of the State, passed in March, 1866, which enacted, "That in all civil actions which may arise in courts of justice for debts contracted during the late war in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract; and the jury, in making up their verdict, shall take the same into consideration, and determine the value of said contract in present currency in the particular locality in which it is to be performed, and render their verdict accordingly."

This statute, as construed by the court, allowed the jury to place their own judgment upon the value of the contract in suit, and did not require them to take the value stipulated by the parties. A provision of law of that character, by constituting the jury a revisory body over the indiscretions and bad judgments of contracting parties, might in many instances relieve them from hard bargains, though honestly made upon an erroneous estimate of the value of the articles purchased, but would create an insecurity in business transactions which would be intolerable. It is sufficient, however, to say that the Constitution of the United States interposes an impassable barrier to such new innovation in the administration of justice, and with its conservative energy still requires contracts, not illegal in their character, to be enforced as made by the parties, even against any state interference with their terms.

The extreme depreciation of Confederate currency at the time the wood, which is the cause of the suit, was purchased, gives a seeming injustice to the result obtained. But, until we are made acquainted with all the circumstances attending the transaction, we cannot affirm anything on this point. The answer alleges that the wood was to be cut by the defendant's hands, and that the plaintiff's testatrix was only to furnish the trees standing. It may be that, under such circumstances, the cost of felling the trees and removing the wood was nearly equal to the value of the wood by the cord as found by the jury, which was fifty cents. Be that as it may, it is not for the court to give another value to the contract than that stipulated by the parties, nor is it within the legislative competence of a State to authorize any such proceeding.

The judgment of the Supreme Court of North Carolina must be reversed and the cause remanded for further proceedings.

Mr. Justice Bradley, dissenting:

I dissent from the judgment of the court in this case. The parties never contracted that the price to be paid for the wood was to be equivalent to any amount of specie. The price contracted

for was \$1 per cord. Specie at that time was worth \$21 to one of Confederate currency. Can it be supposed that the parties agreed on a value of five cents per cord for the wood? The suggestion does not appear to me to be reasonable. The truth is, that the relation between Confederate currency and specie in North Carolina at that time is entirely unsuitable to be used as a rule in estimating the value of contracts. Specie could not be had at all, and consequently the relation between currency and specie was no guide as to the value of currency in purchasing commodities. The verdict finds that the wood, at the time of the contract, was worth fifty cents in specie, per cord; and yet it sold for a dollar in currency. This shows that currency was equivalent to fifty cents on the dollar in purchasing capacity. I hold, therefore, that the law of North Carolina, in allowing the jury to estimate the real value of the consideration in cases where it is impossible to get at the true value of the money named in the contract, is a most sensible and just law.

By what authority do we scale down the price named in the contract at all? Is it not on the ground that the value of the money named by the parties is not a true criterion of the value of the contract? When once we admit this, we make that money a mere commodity, and endeavor to find its true value. How, then, is its true value to be measured? Is it to be measured only by the amount of specie it would purchase at the time, when, perhaps, no specie existed in the country? Why not measure its value by the amount of the United States Treasury notes which it would buy? They were money, as well as specie. But suppose they were not to be had in the market any more than specie. Under such circumstances, is not the only true method of ascertaining its value the purchasing capacity which it had? I hold that this is the true test, when, as stated by the Legislature of North Carolina in its preamble to the Act, it is impossible to scale the value of Confederate money accurately for all parts of the State under the varying circumstances that arose. Under such circumstances, the only fair mode of ascertaining the purchasing value of the currency used is to ascertain the true value of the consideration or thing purchased. This is not to set aside the contract of the parties, but to carry out their contract. It is the proper method of ascertaining what their contract really meant, and giving it full force and effect.

Where a regular current ratio exists between a paper currency and specie or other lawful money, of course it ought to be used as the rule to ascertain the true value of contracts. But when no such regular marketable value does exist, then the next best mode of getting at the value of the contract, or of the currency mentioned therein, is to ascertain the true value of the subject-matter about which the contract was made. This is what the Legislature of North Carolina authorized to be done, and what was done in this case.

I think the judgment should be affirmed.

Cited—94 U. S., 435; 104 U. S., 602; 105 U. S., 140; 3 Wood, 238, 248.

EDWARD MATTHEWS, *Plf. in Err.*,

v.

NELSON McSTEAD.

(See S. C., 1 Otto, 7-13.)

*Partnership, when not dissolved by the war—
President's Proclamation.*

1. A partnership, where one member of the firm resided in New York and the other in Louisiana, was not dissolved by the war of the rebellion, prior to Apr. 23, 1861, and an acceptance at that date of a bill of exchange by the firm, bound all the members of it.

2. Before the President's Proclamation of Aug. 16, 1861, commercial intercourse between the rebellious and the other States was not unlawful.

[No. 10.]

Argued Oct. 13, 1875. Decided Oct. 25, 1875.

IN ERROR to the Court of Common Pleas for the City and County of N. Y.

This action was commenced in the Court of C. P. of the State of N. Y. by Nelson McStead, a resident of New Orleans, against the members of the firm of Brander, Chambliss & Co., of N. O., to recover the amounts of three acceptances and one promissory note made by that firm. The present plaintiff in error alone appeared. He answered that at the time in question he was a resident of N. Y., and the other parties residents of La. Among other defenses he set up that the partnership was dissolved by the war of the rebellion before the instruments sued on were made. The first of the acceptances was dated Apr. 23, 1861, and the others, with the note, in Jan. and Feb., 1862. At the trial, the judge instructed the jury to find for the plaintiff for the amount of the acceptances and note, with interest. This judgment was affirmed at the General Term upon the condition, which was complied with, that its amount be reduced by stipulation to the amount of the first acceptance and interest. The judgment was then affirmed on appeal by the Court of Appeals of N. Y., and the defendant sued out this writ of error. At a former Term a motion was made and denied to dismiss the writ of want of jurisdiction. The sole question considered here was whether the copartnership was or was not dissolved by the war prior to the dates of the acceptance recovered upon in the State Court; i. e., Apr. 23, 1861.

Messrs. John Sherwood and Wm. M. Evarts, for plaintiff in error:

The effect of the war of the rebellion was to dissolve the copartnership between citizens of the rebellious States and citizens of the rest of the United States.

The *Prize Cases*, 2 Black, 635 (67 U. S., XVII., 456); *The William Bagaley*, 5 Wall., 877 (72 U. S., XVIII., 588); *Hanger v. Abbott*, 6 Wall., 535 (73 U. S., XVIII., 941); *The Venice*, 2 Wall., 274 (69 U. S., XVII., 866); *Griswold v. Waddington*, 15 Johns., 57; *S. C.*, 16 Johns., 488; *Bk. v. Matthews*, 49 N. Y., 12.

The war began in Louisiana Apr. 19, 1861, the day fixed being the date of the Proclamation of intended blockade by the President.

The Protector, 12 Wall., 700 (79 U. S., XX., 463); *The Venice*, *supra*; *Hanger v. Abbott*, *supra*; *Mrs. Alexander's Cotton*, 2 Wall., 419

(69 U. S., XVII., 919); *Swinnerton v. Ins. Co.*, 37 N. Y., 174; *The Ouachita Cotton*, 6 Wall., 581 (73 U. S., XVIII., 985).

Commercial intercourse between citizens of the different sections was, from that time forth, interdicted.

Messrs. Aug. F. Smith and J. Hubley Ashton, for defendant in error:

When the acceptance was made, Matthews was in New Orleans, daily, attending to the business of his firm; his firm received for their acceptance a commission of 2½ per cent., and it was proved that the bill of exchange for \$8,050.06 was made and accepted under the personal supervision of Matthews.

There is no principle nor rule of law that will enable Matthews to repudiate a contract so made by himself in New Orleans, in the course of a business just organized by himself, and which he was himself conducting there.

Kershaw v. Kelsey, 100 Mass., 561; see, *Ward v. Smith*, 7 Wall., 447 (74 U. S., XIX., 207); 2 Kent, 63; *Conn. v. Penn.*, Pet. C. C., 496; *Denniston v. Imbrie*, 8 Wash. C. C., 896; *Spred v. Smith*, U. S. Ct., Miss., reported 2 Am. L. T. Rep., 149; *Leathers v. Ins. Co.*, 2 Bush (Ky.), 296; *Perkins v. Rogers*, 35 Ind., 184.

Mr. Justice Strong delivered the opinion of the court:

The judgment which this writ of error brings before us for review was given by the Court of Appeals, in affirmance of a judgment against the plaintiff in error, in the Court of Common Pleas in the City and County of New York.

The original cause of action was *inter alia*, an acceptance of a bill of exchange by the firm of Brander, Chambliss & Co., of New Orleans, it being alleged that Matthews was, at the time of the acceptance, a member of that firm. The bill of exchange was dated April 23, 1861, made payable in one year to the order of McStead, Value & Co., and it was accepted by Brander, Chambliss & Co. on the day of its date. The principal defense and the only one which presents a federal question, was, that at the time when the acceptance was made, the defendant, Matthews, was a resident of the State of New York; that the other members of the firm, also made defendants in the suit, were residents of Louisiana and that, before the acceptance, the copartnership was dissolved by the war of the rebellion. This defense was not sustained in the Common Pleas, and the judgment of that court was affirmed by the Court of Appeals.

The single question which this record presents for our consideration is, whether a partnership, where one member of the firm resided in New York and the others in Louisiana, was dissolved by the war of the rebellion prior to April 23, 1861.

That the civil war had an existence commencing before that date must be accepted as an established fact. This was fully determined in *Prize Cases*, 2 Black, 635 [67 U. S., XVII., 459]; and it is no longer open to denial. The President's Proclamation of April 19, 1861, declaring that he had deemed it advisable to set on foot a blockade of the ports within the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, was a recognition of a war waged, and conclusive evidence that a state of war existed between

the people inhabiting those States and the United States.

It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war and the effect of a state of war, even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful and is interdicted. The reasons for this rule are obvious. They are, that, in a state of war, all the members of each belligerent are respectively enemies of all the members of the other belligerent; and, were commercial intercourse allowed, it would tend to strengthen the enemy, and afford facilities for conveying intelligence, and even for traitorous correspondence. Hence it has become an established doctrine, that war puts an end to all commercial dealing between the citizens or subjects of the nations or powers at war, and "places every individual of the respective governments, as well as the governments themselves, in a state of hostility;" and it dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war; for their continued existence would involve community of interest and mutual dealing between enemies.

Still further, it is undeniable that civil war brings with it all the consequences in this regard which attend upon and follow a state of foreign war. Certainly this is so when civil war is sectional. Equally with foreign war, it renders commercial intercourse unlawful between the contending parties, and it dissolves commercial partnerships.

But, while all this is true as a general rule, it is not without exceptions. A state of war may exist, and yet commercial intercourse be lawful. They are not necessarily inconsistent with each other. Trading with a public enemy may be authorized by the sovereign and even, to a limited extent, by a military commander. Such permissions or licenses are partial suspensions of the laws of war, but not of the war itself. In modern times they are very common. Bynkershoek, in his *Quæst. Jur. Pub.*, lib. 1, ch. 8, while asserting as a universal principle of law that an immediate consequence of the commencement of war is the interdiction of all commercial intercourse between the subjects of the States at war, remarks: "The utility, however, of merchants and the mutual wants of nations, have almost got the better of the laws of war as to commerce. Hence it is alternatively permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in, of the goods of others. Thus sometimes a mutual commerce is permitted generally; sometimes as to certain merchandise only, while others are prohibited; and sometimes it is prohibited altogether." Halleck, in his treatise on the Laws of War, p. 676, *et seq.*, discusses this subject at considerable length, and remarks: "That branch of the government to which, from the form of its constitution, the power of declaring or making war is intrusted, has an undoubted right to regulate and modify, in its discretion, the hostilities which it sanctions. * * * In England, licenses are granted directly by the
See 1 Otto,

Crown, or by some subordinate officer to whom the authority of the Crown has been delegated, either by special instructions, or under an Act of Parliament. In the United States, as a general rule, licenses are issued under the authority of an Act of Congress; but in special cases, and for purposes immediately connected with the prosecution of the war, they may be granted by the authority of the President, as Commander-in-Chief of the military and naval forces of the United States."

It being, then, settled that a war may exist, and yet that trading with the enemy, or commercial intercourse, may be allowable, we are brought to inquire whether such intercourse was allowed between the loyal citizens of the United States and the citizens of Louisiana until the 23d of April, 1861, when the acceptance was made upon which this suit was brought. And, in determining this, the character of the war and the manner in which it was commenced ought not to be overlooked. No declaration of war was ever made. The President recognized its existence by proclaiming a blockade on the 19th of April, 12 Stat. at L., 1258; and it then became his duty as well as his right to direct how it should be carried on. In the exercise of this right, he was at liberty to allow or license intercourse; and his Proclamations, if they did not license it expressly, did, in our opinion, license it by very cogent implications. It is impossible to read them without a conviction that no interdiction of commercial intercourse, except through the ports of the designated States, was intended. The first was that of April 15, 1861. The forts and property of the United States had, prior to that day, been forcibly seized by armed forces. Hostilities had commenced; and, in the light of subsequent events, it must be considered that a state of war then existed. Yet the Proclamation, while calling for the militia of the several States, and stating what would probably be the first service assigned to them, expressly declared, that, "In every event, the utmost care would be observed, consistently with the re-possession of the forts, places and property which had been seized from the Union, to avoid any devastation, destruction of or interference with property, or any disturbance of peaceful citizens in any part of the country." Manifestly, this declaration was not a mere military order. It did not contemplate the treatment of the inhabitants of the States in which the unlawful combinations mentioned in the Proclamation existed, as public enemies. It announced a different mode of treatment—the treatment due to friends. It is to be observed that the Proclamation of April 15, 1861, 12 Stat. at L., 1258, was not a distinct recognition of an existing state of war. The President had power to recognize it (*The Prize Cases*), but he did not prior to his second Proclamation, that of April 19, in which he announced the blockade. Even then, the war was only inferentially recognized; and the measures proposed were avowed to be "With a view to
* * * the protection of the public peace and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled." The reference here was plainly to citizens of the insurrectionary States; and the purpose avowed appears to be inconsistent with their being regarded as pub-

lic enemies and, consequently, debarred from intercourse with the inhabitants of States not in insurrection. The only interference with the business relation of citizens in all parts of the country, contemplated by the Proclamation, seems to have been such as the blockade might cause. And that it was understood to be an assent by the Executive to continued business intercourse may be inferred from the subsequent action of the government (of which we may take judicial notice) in continuing the mail service in Louisiana and the other insurrectionary States long after the blockade was declared. If it was not such an assent or permission, it was well fitted to deceive the public. But in a civil, more than in a foreign war, or a war declared, it is important that unequivocal notice should be given of the illegality of traffic or commercial intercourse; for, in a civil war, only the government can know when the insurrection has assumed the character of war.

If, however, the Proclamations, considered by themselves, leave it doubtful whether they were intended to be permissive of commercial intercourse with the inhabitants of the insurrectionary States, so far as such intercourse did not interfere with the blockade, the subsequent Act of Congress passed on the 18th day of July, 1861, 12 Stat. at L., 255, ought to put doubt at rest.

The Act was manifestly passed in view of the state of the country then existing, and in view of the Proclamation the President had issued. It enacted, that in a case therein described, a case that then existed, "It may and shall be lawful for the President, by Proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same, and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue." Under authority of this Act, the President did issue such a Proclamation on the 16th of August, 1861, 12 Stat. at L., 1262; and it stated that all commercial intercourse between the States designated as an insurrection and the inhabitants thereof, with certain exceptions, and the citizens of other States and other parts of the United States, was unlawful. Both the Act and the Proclamation exhibit a clear implication that, before the first was enacted and the second was issued, commercial intercourse was not unlawful; that it had been permitted. What need of declaring it should cease, if it had ceased or had been unlawful before? The enactment that it should not be permitted after a day, then in the future, must be considered an implied affirmation that up to that day it was lawful; and certainly Congress had the power to relax any of the ordinary rules of war.

We think, therefore, the Court of Appeals was right in holding that the partnership of Brander, Chambliss & Co., had not been dissolved by the war when the acceptance upon which the plaintiff in error is sued, was made.

The judgment is affirmed.

Cited—92 U. S., 287; 93 U. S., 505.

FRANCIS DAINESE, *Ply. in Err.*,

v.

CHARLES HALE.

(See S. C., 1 Otto, 13-21.)

Powers of consul—extent of—consuls to Turkey, jurisdiction of—foreign laws—action against Consul-General of Egypt—insufficient plea.

*1. Judicial powers are not necessarily incident to the office of consul, although usually conferred upon consuls of Christian nations in Pagan and Mahometan countries, for the decision of controversies between their fellow-citizens or subjects residing or commorant there, and for the punishment of crimes committed by them.

2. The existence and extent of such powers depend on the treaty stipulations and positive laws of the nations concerned. In Turkey, for example, the judicial powers of consuls depend on the treaty stipulation conceded by the government of that country, and on the laws of the several States appointing the consuls.

3. The Treaty between the United States and Turkey, made in 1862, if not that made in 1830, has the effect of conceding to the United States the same privilege, in respect to consular courts and jurisdiction which are enjoyed by other Christian nations, including civil as well as criminal jurisdiction, and the Act of Congress of June 22, 1860, established the necessary regulations for the exercise of such jurisdiction.

4. But as this jurisdiction is, in terms, only such as is allowed by the laws of Turkey, or its usages in its intercourse with other Christian nations, those laws or usages must be shown in order to know the precise extent of such jurisdiction.

5. The court cannot, ordinarily, take judicial notice of foreign laws and usages; a party claiming the benefit of them by way of justification must plead them.

6. The defendant, as Consul-General of Egypt, in 1864, issued an attachment against the goods of the plaintiff, there situate; neither the plaintiff nor the persons at whose suit the attachment was issued being residents or sojourners in the Turkish dominions, but both being citizens of the United States. For this act the plaintiff brought suit to recover the value of the goods attached. The defendant pleaded his official character and, as incident thereto, claimed jurisdiction to entertain the suit in which the attachment was issued. Held, that the plea was defective for not setting forth the laws or usages of Turkey upon which, by the Treaty and Act of Congress conferring the jurisdiction, the latter was made to depend and which alone would show its precise extent, and that it embraced the case in question.

[No. 25.]

Argued Oct. 14, 15, 1875. Decided Oct. 25, 1875.

IN ERROR to the Supreme Court of the District of Columbia.

This was an action *ex delicto*, commenced in the court below by the plaintiff in error against the defendant. The defendant filed his plea, and the plaintiff demurred. The court overruled the demurrer, and the plaintiff appealed to the General Term, where the judgment overruling the plaintiff's demurrer was affirmed. The plaintiff brought the case to this court.

The case is stated in the opinion.

Messrs. F. P. Cuppy and S. S. Henkle, for plaintiff in error:

The question made by the record is, whether, in 1864, the Consul-General of the United States, in Egypt, was clothed with the judicial powers to do the acts complained of. The defendant claims that he was invested with such

*Head notes by Mr. Justice BRADLEY.

NOTE.—Foreign laws, how proved. See note to *Ennis v. Smith* 55 U. S. (14 How.), 400.

powers, both by the law of nations and the laws of the United States.

1. A consul is not invested with judicial powers by the law of nations. See, Vatt., b. 2, p. 147, sec. 34; b. 4, ch. 6, sec. 75; Halleck, Int. L., 239, 255, 251; Wildm., Int. L., 180; *The Anne*, 3 Wheat., 435; *The William Harris*, 1 Ware, 878.

2. The defendant was not justified in doing the things of which we complain, by the laws of the United States.

Treaty between the United States and the Ottoman Porte concluded May 7, 1830. See, 8 Stat. at L., 409; art. IV. Treaty ratified June 5, 1862, 12 Stat. at L., 1218; art. I., and XXI.; 1 Kent, Com., sec. 42; 12 Stat. at L., 72; Wheat. Int. L., part ii., sec. 110; 7 Ops. Attys-Gen., 495; 14 Stat. at L., 810, sec. 11.

Mr. W. Penn Clarke, for defendant in error:

The demurrer was properly overruled for this reason: because the Treaties between the United States and the Turkish Empire, and the Laws of the United States as well as the law of nations, confer upon the Consul-General of the United States in Egypt, judicial powers, both civil and criminal, over the persons and property of citizens of the United States in that country.

Treaty with Ottoman Empire, ratified Feb. 12, 1831, art. IV.; 8 Stat. at L., 409; Treaty ratified June 5, 1862, art. I., XX., XXI.; 12 Stat. at L., 1213, 1217, 1218, 1029; 11 Stat. at L., 710, 64; 12 Stat. at L., 1056, 1078, 1076; 14 Stat. at L., 823; U. S. Consular Manual, 72-75; Halleck, Int. L., 225; Wheat. Int. L., pt. ii., ch. 2 sec. 110; Phillim. Int. L., sec. 272; Marten, *Guide Diplomatique*, sec. 88; 1 Wildm. Int. L., 180; Horne, Diplomacy, sec. 1; 7 Op. Attys-Gen., 346; see, 12, Stat. at L., secs. 2, 3, p. 73.

Mr. Justice Bradley delivered the opinion of the court:

This action was brought to recover the value of certain goods, chattels and credits of the plaintiff, which the defendant, in November, 1864, then being Consul-General of the United States in Egypt, caused to be attached. The declaration alleged that the defendant, by usurpation and abuse of his power as such Consul-General, and for the malicious purpose of injuring the plaintiff, took cognizance of a certain controversy between the plaintiff and Richard H. and Anthony B. Allen (all being citizens of the United States, and none of them residents of or sojourners within the Turkish dominions at that time), and made and issued the order of attachment by virtue of which the seizure in question was made.

The defendant pleaded that, at the time of issuing the attachment, he was agent and Consul-General of the United States in Egypt, and was furnished with a letter of credence from the President of the United States to the Pacha; that in his said official capacity he exercised the functions and duties of a minister; and by the law of nations, as well as the laws of the United States, he was invested with judicial functions and power over citizens of the United States residing in Egypt, and in the exercise of those functions, took cognizance of the cause referred to in the declaration, and issued the attachment complained of.

To this plea there was a general demurrer.

See 1 Otto.

The defendant, by his plea, asked the court to take judicial notice that his official character gave him the jurisdiction which he assumed to exercise. Could the court do this? Can this court do it?

It cannot be contended that every consul, by virtue of his office, has power to exercise the judicial functions claimed by the defendant; for it is conceded that this is not the case in Christian countries. And whilst, on the other side, it is also conceded that in Pagan and Mahometan countries it is usual for the ministers and consuls of European States to exercise judicial functions as between their fellow-subjects or citizens, it clearly appears that the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction. The instructions given by the British Foreign Office to their consuls in the Levant in 1844, as quoted by Mr. Phillimore, do not claim anything more. They say:

"The right of British consular officers to exercise any jurisdiction in Turkey, in matters which in other countries come exclusively under the control of the local magistracy, depends originally on the extent to which that right has been conceded by the sultans of Turkey to the British Crown; and, therefore, the right is strictly limited to the terms in which the concession is made. The right depends, in the next place, on the extent to which the Queen, in the exercise of the power vested in Her Majesty by Act of Parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects." Int. Law, Vol. II., p. 278, sec. 277.

Historically, it is undoubtedly true, as shown by numerous authorities quoted by Mr. Warden in his treatise on "The Origin and Nature of Consular Establishments," that the consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe, and the prevalence of civil order in the several Christian States, have had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the States which the consuls represent.

The transactions which are the subject of this suit took place in 1864; and the powers of our Consul-General in Egypt at that time must be regulated by the Treaties with Turkey and by the laws of the United States then in force.

The first Treaty between the United States and the Ottoman Porte was concluded in 1830, 8 Stat. at L., 408; and, amongst other things, it provided, in Article III., that "American merchants established in well-defended States of the Sublime Porte for purposes of commerce shall not be disturbed in their affairs, nor shall they be treated in any way contrary to established usages." By article IV., it was further provided as follows:

"If litigations and disputes should arise between the subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced, unless

the American Consuls be present. Cases in which the sum may exceed five hundred piastres shall be referred to the Sublime Porte, to be decided according to the laws of equity and justice. Citizens of the United States of America residing within their commerce and not being charged or convicted of any crime or offense, shall not be arrested; and, even when they may have committed some offense, they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consuls and punished according to their offense, following, in this respect, the usage observed towards other Franks."

In 1845 an Act of Congress was passed, entitled "An Act to Carry into Effect Certain Provisions in the Treaties between the United States and China and the Ottoman Porte, giving Certain Judicial Powers to Ministers and Consuls of the United States in those Countries." 9 Stat. at L., 276. A Treaty had been made with China in 1844, 8 Stat. at L., 592, conceding to the authorities of the United States full civil and criminal jurisdiction between citizens of the United States in that country. The law was passed in reference to this Treaty and to that with the Ottoman Porte before cited.

This Act contained regulations as to the mode of exercising the judicial powers stipulated for in the Treaty with China. It conferred these powers upon the resident commissioner and consuls respectively, and authorized them to adjudicate in accordance with the laws of the United States and the common law, supplemented, when these were insufficient, by decrees and regulations to be made by the commissioner himself. The commissioner, with the advice of the consuls, was to prescribe the forms of process and proceeding. By the 22d section of the Act, its provisions, so far as related to crimes committed by citizens of the United States, were extended to Turkey under the Treaty of 1830, to be executed by the ministers and consuls of the United States in that country, who were *ex officio* vested with the powers given by the Act to similar officials in China, so far as regarded the punishment of crime.

It is evident that this Act failed to confer upon the consuls of the United States in Turkey any power to exercise judicial functions in civil cases, whatever may have been the scope and intention of the Treaty of 1830. Whilst it may be true that the expression in the third article of the Treaty, that American merchants shall not be disturbed in their affairs, nor treated contrary to established usages, was understood to and did confer upon American merchants the same privileges of extraterritoriality enjoyed by the subjects of other Christian nations, the Act of 1848 did not assume to enforce such a construction of it.

But in 1860, another Act was passed to carry into effect a new Treaty made with China in 1858, 12 Stat. at L., 1081, and other Treaties made with Japan, Siam, Persia and other countries (12 Stat. at L., 72), by which very full and explicit regulations were again made in reference to the exercise of judicial powers by ministers and consuls of the United States in those countries. By the 21st section of this Act, the same declaration was made as in the 22d section of the Act of 1848 in reference to the criminal jurisdiction to be exercised by the minister and

consuls of the United States in Turkey; and a clause was added, giving them civil jurisdiction also, as follows: "Who [referring to such minister and consuls] are hereby *ex officio* vested with the powers herein conferred upon the minister and consuls in China, for the purposes above expressed, so far as regards the punishment of crime;" adding, "and also for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey, or its usages in its intercourse with the Franks or other foreign Christian nations."

So far, then, as the true construction of the Treaty of 1830 would permit the exercise of civil jurisdiction by our consuls, the Act of 1860 authorized it to be exercised, and supplied all the regulations necessary for that purpose.

In 1862, 12 Stat. at L., 1213, another Treaty was entered into with the Ottoman Porte, by which, after confirming all such parts of the Treaty of 1830 as were not abrogated or changed, amongst other things it was provided, in article I., as follows: "All rights, privileges or immunities which the Sublime Porte now grants or may hereafter grant to or suffer to be enjoyed by the subjects, ships, commerce or navigation of any foreign power, shall be equally granted to and exercised and enjoyed by the citizens, vessels, commerce and navigation of the United States of America." If, therefore, it be true, as laid down by writers and public documents, that the subjects of other Christian nations have and enjoy in Turkey the right to have their civil controversies decided by their own minister and consuls, it would seem clear, that under the Treaty of 1862, if not under that of 1830, the same right is guaranteed to citizens of the United States.

But it is objected, that, in 1864, no Act had been passed by Congress to carry the last Treaty into effect. Such an Act was passed in 1866, simply, however, extending to Egypt and the Consul-General there the provisions of the Act of 1860. See 11 of appropriation Bill, 14 Stat. at L., 322. This clause was probably adopted merely to obviate any doubt on the subject. For as treaties made under the authority of the United States are, by the Constitution, declared to be part of the supreme law of the land, when they are complete in themselves, and need no supplemental legislation to carry them into effect, such legislation is not necessary for the purpose of giving them force and validity. So far as relates to the jurisdiction in question, this is the character of the Treaty of 1862, taken in connection with the Act of 1860. The Act gave the jurisdiction so far as usage in Turkey would permit it. The Treaty secured the consent of the Turkish Government to its exercise.

The State Department of the United States seems to have regarded the Treaty of 1830 as establishing the jurisdiction in question. In the instructions contained in the Consuls' Manual, promulgated by the department in December, 1862 (adopting the learned opinion of Attorney-General Cushing, dated Oct. 23, 1855, 7 Op. Attys-Gen., 565), it is said that the Acts of Congress of 1848 and 1860 provide in terms for the exercise of judicial authority by ministers and consuls in Turkey only so far as regards the punishment of crime, leaving the question of civil jurisdiction to stand upon treaties or the

peculiar public law of the Levant. Sec. 165. And after referring to the language of Article III. of the Treaty of 1880, which stipulated that "American merchants established in the well-defended States of the Sublime Porte for purposes of commerce * * * shall not be disturbed in their affairs, nor shall they be treated in any way contrary to established usages," and conceding that its construction might admit of discussion, the following conclusions were, nevertheless, reached:

"As to all civil affairs to which no subject of Turkey is a party, Americans are wholly exempt from the local jurisdiction; and in civil matters, as well as criminal, Americans in Turkey are entitled to the benefit of 'the usage observed towards other Franks.' * * * The phrase in the second article engages that citizens of the United States in Turkey shall not be 'treated in any way contrary to established usages.' The 'established usages' are the absolute exemption of all Franks, in controversies among themselves, from the local jurisdiction of the Porte.

"The general doctrine thus in force in the Levant of the extraterritoriality of foreign Christians, has given rise to a complete system of peculiar municipal and legal administration, consisting of:

"1. Turkish tribunals for questions between subjects of the Porte and foreign Christians.

"2. Consular courts for the business of each nation of foreign Christians.

"3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation.

"4. Mixed tribunals of Turkish magistrates and foreign Christians at length substituted in part for cases between Turks and foreign Christians.

"5. Finally, for causes between foreign Christians, the substitution at length of mixed tribunals in place of the separate courts—an arrangement introduced first by the legations of Austria, Great Britain, France and Russia, and then tacitly acceded to by the legations of other foreign Christian nations." Consuls' Man. of Dec., 1862, secs. 169-171.

These conclusions, being publicly issued by the proper Executive Department of the Government for the instruction and guidance of our consuls, are entitled to the highest respect in construing the statutes and treaties upon which their powers depend. And, in view of the confirmatory as well as independent effect of the Act of 1860 and the Treaty of 1862, we have no doubt that in 1864, when the transactions in question took place, the minister and principal consuls of the United States in Turkey (including the Consul-General in Egypt) had all such jurisdiction in civil causes between citizens of the United States as was permitted by the laws of Turkey or its usages in its intercourse with other Christian nations.

But here we are met by a difficulty arising from the extreme generality of the defense set up in the plea. What are the laws of Turkey and its usages in its intercourse with other Christian nations in reference to the powers allowed to be exercised by their public ministers and consuls in judicial matters? The plea does not inform us. It leaves the court to infer or to take judicial knowledge of those laws and

usages. But can it do this? Foreign laws and usages are, as to us, matters of fact and not matters of law; and although the court may take judicial cognizance of many matters of fact of public importance, yet of foreign laws and customs, which are multiform and special in their character, it would be very dangerous for it to do so, at least without having had them brought to its attention and knowledge by previous adjudications or proofs. The general fact that public ministers and consuls of Christian States in Turkey exercise jurisdiction in civil matters between their fellow-citizens or subjects, might be assumed as sufficiently attested by the works on international law and the Acts and instructions of our own government. But the precise extent of this jurisdiction is unknown to us. Whether it applies to any but residents in Turkey, or to travelers as well; whether to persons not in the country at all but having property there, or claims against persons who are there; whether to cases like the present, where neither party resides in Turkey or is sojourning there, are questions which are not answered by the ordinary statements made in reference to this jurisdiction. As the power of the Consuls of the United States, according to the treaties and laws as they stood in 1864, depended on the laws or usages of Turkey, those laws or usages should have been pleaded in some manner, however briefly, so that the court could have seen that the case was within them; for, failing to do this, the plea was defective in substance, and judgment should have been rendered for the plaintiff on the demurrer.

The judgment of the Supreme Court of the District of Columbia must be reversed and the cause remanded, with directions to allow the defendant to amend his plea on payment of costs.

Cited—2 McA., 391.

THOMAS J. SEMMES, Claimant of Six Lots of Ground, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C., 1 Otto., 21-27.)

Amendment of process in Circuit Court—Confiscation Act—when property vests in U. S.—adjournment of sale—decree by Circuit Court—effect of pardon on sale.

1. The power to amend all processes returnable to the Circuit Court is vested in that court as fully as it is in the Supreme Court. Such court may allow an amendment of a writ of error.

2. A decree of the Circuit Court ought not to be reversed for a defect in the form of the process, which is amendable.

3. Legal proceedings against property under the Confiscation Act were not dismissed by the Amnesty Proclamation.

4. Property condemned as forfeited to the United States under the Confiscation Act, became the property of the United States from the date of the decree of condemnation.

5. The sale under the decree of condemnation is not null, because it was not made on the day named in the writ of *venditioni exponas*; the marshal, in the exercise of a sound discretion, may adjourn the sale to another day.

6. Complete jurisdiction of the cause was vested in the Circuit Court by the writ of error; and the Circuit Court, having reversed the decree of the district court, might proceed to pass such decree as should have been passed by the subordinate court;

and if a decree confirming the sale was necessary, the Circuit Court could make such a decree.

7. Pardon for treason will not restore rights to property, previously condemned and sold in the exercise of belligerent rights, as against a purchaser in good faith and for value.

[No. 27.]

Submitted Oct. 15, 1875. Decided Oct. 25, 1875.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. Thomas J. Semmes, in person, and **Robert Mott, W. S. Cox** and **W. D. Davidge**, for plaintiff in error.

Messrs. Edwards Pierrepont, Atty-Gen., S. F. Phillips, Solicitor-Gen., and C. H. Hill and E. B. Smith, Asst. Attys-Gen., for defendant in error.

Mr. Justice Clifford delivered the opinion the court:

Proceedings *in rem* were instituted in the district court on the 7th of August, 1863, under the Confiscation Act of the 17th of July, 1862, 12 Stat. at L., 589, against certain real property of the respondent; which proceedings resulted, on the 5th of April, 1865, in the condemnation of the property described in the libel. On the 11th of the same month a writ of *venditioni exponas* was issued, commanding the Marshal to sell the property on the 18th of the same month; but the Marshal did not sell the same on that day, for the reason, as appears by his return, that the best price bid at the time and place of the sale did not amount to two thirds of the appraised value of the property; and, for the reason stated, the Marshal withdrew the property from sale, and again advertised the same for sale, as directed by the prior order of the court.

Two lots of land were embraced in the libel and the decree of condemnation, which, in fact, were not the property of the respondent. Accordingly, the true owner of the same in the meantime—to wit: on the 2d of May, 1865—filed a petition in the same court, setting forth his right to the two lots in question, and stating that they were improperly advertised for sale by the Marshal, and prayed the court to open the decree to allow him to assert his title.

Consent in writing to that effect having been given by the district attorney, the court subsequently entered a decree opening the decree of condemnation for the purpose of enabling the petitioner to submit to the court his claim to those lots, as evidenced by the proofs on file. Pursuant thereto, the court, on the 31st of May in the same year, rendered judgment, restoring those two lots to the intervenor, as claimed in his petition.

Such correction of the decree of condemnation having been made, the return of the Marshal shows that he sold the residue of the lots condemned, in pursuance of the second advertisement, to E. W. Burbank, for the amount specified in the record, and that he paid the money over to the clerk of the court.

On the 4th of March, 1868, the respondent having first suggested that the decree of condemnation had been opened, and that a portion of the property libeled had never been condemned by any subsequent decree, moved the court to set aside the default against him, and for leave to file his claim and answer. Hearing

was had on the motion, and the court ordered that the purchaser of the property should be made a party to the rule. Burbank, the purchaser, accordingly appeared and filed an exception to the rule, that his rights as purchaser could not be questioned in such a form of proceeding, and offered in evidence the deed of the Marshal and the decree of condemnation, together with a writ of *venditioni exponas*. Both parties were again heard; and the court, on the 15th of April in the same year, overruled the exceptions of the purchaser, and set aside the default of the respondent, and granted him leave to file his claim and answer.

Leave to that effect having been granted, the respondent filed his answer, alleging his ownership of the property, the insufficiency of the allegations contained in the libel, and denied that the President ever authorized the seizure of his property; and averred that he had been pardoned by the President, and that he was included in the general Amnesty Proclamation. Proofs were introduced; and the court, on the 27th of June following, entered a final decree, dismissing the libel, and restoring the property to the respondent upon the payment of all costs.

Proper steps were taken in behalf of the United States to sue out a writ of error, and the cause was by the United States removed into the Circuit Court, where the decree of the district court was in all things reversed and a decree entered in favor of the United States, that the decree of condemnation originally pronounced by the district court stand and remain in full force and effect, and that the sale made by virtue thereof do stand confirmed. Whereupon the respondent sued out a writ of error, and removed the cause into this court.

Certain formal errors are assigned as follows, which will first be considered:

1. That the writ of error from the Circuit Court to the district court was made returnable on the first Monday of December, instead of the first Monday in November, as it should have been; and because the writ of error was not returnable in accordance with the order allowing the same, nor according to the citation.

2. Errors affecting the merits are also assigned, as follows: (1) That the President had by his Proclamation of Amnesty dismissed all proceedings against any person or his property, engaged, or in any manner implicated, in the rebellion. (2) That, the original decree having been opened, the property of the respondent could not be sold at all, as there was no subsisting decree of condemnation. (3) That the sale to the purchaser was null, because it was not made on the day specified in the writ of *venditioni exponas*. (4) That the Circuit Court had no authority to confirm the sale to the purchaser. (5) That the special pardon as well as the Amnesty Proclamation entitled the respondent to a restoration of his property in case the sale by the Marshal was null and void.

1. Evidently the alleged preliminary defect is one of form, and it is equally clear that the power to amend all process returnable to the Circuit Court is vested in that court as fully as it is in the Supreme Court; and the express provision is, that the Supreme Court may allow an amendment of a writ of error when there is a mistake in the title of the writ or a seal to the writ is wanting, or when the writ is returnable

on a day other than the day of the commencement of the Term next ensuing; and, by the true construction of the provision upon the subject, the same power of amendment is vested in the circuit and district courts in all cases where the process is returnable in those respective courts. 17 Stat. at L., 196; *Hampton v. Rouse*, 15 Wall., 686 [82 U. S., XXI., 250].

Grave doubts are also entertained whether the supposed error would avail the respondent, even if no such Act of Congress had been passed, as it appears that the copy of the writ lodged with the clerk of the district court was correct, and that the transcript of the record of the case was actually made out, returned, and filed in the Circuit Court, before the commencement of the Term of the Circuit Court next ensuing. Such being the fact, the better opinion is that the supposed defect is now wholly immaterial.

Suppose, however, it is otherwise: still the court here is of the opinion that the decree of the Circuit Court ought not to be reversed for a defect of form in the process which is amendable by the express words of an Act of Congress, unless it appears that the alleged defect may have injured the complaining party, or that he would have been prejudiced if the defect had been amended.

2. Nor is it correct to suppose that legal proceedings against the property of the respondent were dismissed by the Amnesty Proclamation, or that the Amnesty Proclamation provided for the restoration of all rights of property to persons engaged in the rebellion. On the contrary, the Proclamation referred to contains the express exception "as to property with regard to slaves," and "in cases of legal proceedings under the laws of the United States," 15 Stat. at L., 700.

Suffice it to remark, that a decree of condemnation in due form of law was entered in this case nearly two years and a half before the Amnesty Proclamation was issued, which shows to a demonstration that the property in controversy in this case falls within the exception contained in that Proclamation; which is all that need be said upon that subject.

3. Sufficient appears in the record to show that the decree was never opened except for the special purpose of allowing the true owner of the two specified lots to file his claim and answer to that part of the libel, as authorized in the written stipulation signed by the district attorney. Argument to show that the true owner of those lots, without such consent in writing, would have been remediless, is unnecessary; and it is equally certain that the court could not open the decree three years after it was entered, for any other purpose than that specified in the written stipulation, and the record shows that it never was attempted to be opened for any other purpose. Viewed in the light of the actual facts disclosed in the record, the assignment of error in that regard is utterly destitute of merit.

4. Properties condemned as forfeited to the United States, under the aforesaid Act of Congress, become the property of the United States from the date of the decree of condemnation. 12 Stat. at L., 589, sec. 7.

Judgment of forfeiture was rendered in this case on the 5th of April, 1865, and the land in question became from that date the property of See 1 Otto.

the United States; and it may well be contended, that, from that time, it could not concern the respondent whether the proceedings of the Marshal in selling the same were regular or irregular, as the title to the land was lost to him when it became vested in the United States. He now contends that the sale is null, because it was not made on the day named in the writ of *venditioni exponas*; to which the United States make answer, that he cannot be heard to raise that question, as his title was divested by the decree of condemnation. But it is not necessary to rest the decision upon that ground, as it is well-settled law that the Marshal, in the exercise of a sound discretion, may adjourn the sale in such a case to another day; and the court is of the opinion that the circumstances disclosed in the record were of a character to fully justify the Marshal in the course which he pursued. *Blossom v. R. R. Co.*, 8 Wall., 209 [70 U. S., XVIII., 47]; *Collier v. Whipple*, 18 Wend., 229; *Requa v. Rea*, 2 Paige, 339.

5. Beyond doubt, the original decree of the district court was complete and correct; and it is doubtless true that the decree of the Circuit Court reversing the second decree of the district court, and adjudging that the first decree of the district court should stand and remain in full force and effect, would have been sufficient without any decree confirming the sale by the Marshal: but, even if the decree confirming the sale be regarded as an act of supererogation, it cannot render invalid what would have been valid without it.

Complete jurisdiction of the cause was vested in the Circuit Court by virtue of the writ of error; and the Circuit Court, having reversed the second decree of the district court, might "proceed to pass such decree as should have been passed" by the subordinate court; and it follows, that, if a decree confirming the sale was necessary, it was entirely competent for the Circuit Court to pass such a decree. Stat. at L., 85.

6. Such proceedings under the Confiscation Act in question are justified as an exercise of belligerent rights against a public enemy, and are not, in their nature, a punishment for treason. Consequently, confiscation being a proceeding distinct from and independent of the treasonable guilt of the owner of the property confiscated, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights, as against a purchaser in good faith and for value. *Miller v. U. S.*, 11 Wall., 268 [78 U. S., XX., 185]; *Confiscation Cases*, 20 Wall., 92 [87 U. S., XXII., 320]; *Gay's Gold*, 18 Wall., 358 [80 U. S., XX., 606].

By the seizure of the property, the district court acquired jurisdiction to pass the decree of condemnation. All of the proceedings prior to and in the sale of the land were regular; and the assumption of power by the district court, nearly three years subsequently, to restore the land, was wholly unauthorized, and was clearly error. Nor did the opening of the decree as to the two lots, not owned by the respondent, afford any justification for the action of the court in restoring the residue of the property, as it is settled law that a judgment may be good in part, and bad in part—good to the extent it is authorized by law, and bad for the residue.

Bigelow v. Forest, 9 Wall., 339 [76 U. S., XIX., 696]; *Day v. Micou*, 18 Wall., 156 [85 U. S., XXI., 860]; *Ex parte Lange*, 18 Wall., 163 [85 U. S., XXI., 872].

Much discussion of the special pardon is unnecessary, as it contained the provision that the respondent should not, "by virtue thereof," claim any property, or the proceeds of any property, that had been sold by the order, judgment or decree of a court under the confiscation laws of the United States. Authorities to show that a pardon may be special in its character, or subject to conditions and exceptions, are quite unnecessary, as they are very numerous, and are all one way.

Decree of the Circuit Court is affirmed.

Cited—92 U. S., 214; 99 U. S., 140.

JOHN D. McLEMORE, *Plff. in Err.*,

v.

THE LOUISIANA STATE BANK.

(See S. C., 1 Otto, 27-29.)

Pledgee's duty as to pledge—taken by superior force—military force.

1. The pledgee is only bound to take that care of the pledge which a careful man bestows on his own property.

2. Proof that without any fault on the pledgee's part and against his protest, the pledge was taken from him by superior force, is a good reason for not returning it.

3. It is a good reason for officers of a bank not returning paper pledged, that they were dispossessed of it by military force.

[No. 28.]

Submitted Oct. 15, 1875. Decided Oct. 25, 1875.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

This action was commenced in the court below by the plaintiff in error. The trial resulted in judgment for the defendant, and the plaintiff brought the case to this court. The case is sufficiently stated by the court.

Messrs. Charles Bowie Singleton and J. Q. A. Fellows, for plaintiff in error.

Messrs. E. & A. C. Janin and L. Janin, for defendant in error.

Mr. Justice Davis delivered the opinion of the court:

It is unnecessary to consider whether in all respects the charge of the circuit court to the jury was correct, because the record shows the case of the plaintiff to be so fatally defective, that the judgment below would not be reversed for instructions, however erroneous. *Brobst v. Brock*, 10 Wall., 519 [77 U. S., XIX., 1002]; *Decatur Bk. v. St. Louis Bk.*, 21 Wall., 801 [88 U. S., XXII., 562]. The case is this: the plaintiff was the owner of certain promissory notes and acceptances, in possession of the commercial firm in New Orleans of which he was a member, which were pledged by the firm, in 1861 and 1862, to the Bank, as security for money loaned to them. This paper was not met at maturity and, with the collaterals pledged for their payment, remained in possession of the Bank until 11th June, 1863, when it was put in liquidation by order of Major-General Banks,

and its effects transferred to military commissioners appointed to close it up. Its officers, while submitting to this order because they had no power to resist it, deemed it unjust and oppressive, and entered a protest against it on their minutes. During the administration of these commissioners, the pledged paper was sold for less than its face. In January, 1866, the military liquidation ceased by order of Major-General Canby, and the effects of the Bank which were unadministered were restored to the Corporation. The plaintiff, on the ground that the securities were parted with illegally, seeks to make the Bank responsible for the proceedings of the commissioners; but this he cannot do. Certainly no act was done or omitted to be done by the Bank, inconsistent with its duty; for it was only bound to take that care of the pledge which a careful man bestows on his own property.

It is true, it was the duty of the Bank to return the pledge, or show a good reason why it could not be returned. This it has done by proof, that without any fault on its part, and against its protest, the pledge was taken from it by superior force. Where this is the case, the common as well as the civil law holds that the duty of the pledgee is discharged. 3 Kent, Com., 579; Story, Bail., sec. 339; *Bk. v. Martin*, 1 La. Ann., 344. That the proceedings of General Banks and the liquidators appointed by him constituted "superior force," which no prudent administrator of the affairs of a corporation could either resist or prevent, is too plain for controversy. It was in the midst of war that the order was made, and with an army at hand to enforce it. There was nothing left but submission under protest. Any other course of action, under the circumstances, instead of benefiting, would have injured everyone who had dealings with the Bank. It has turned out that the plaintiff has suffered injury, but not through the fault of the officers of the Bank; for they retained the notes and bills long after the paper for which they were given as security had matured, and until they were dispossessed of them by military force. Under such circumstances, they have discharged every duty which they owed to the plaintiff; and if loss has been occasioned in consequence of the military order in question, the Bank is not responsible for it.

The judgment is affirmed.

THE FARMERS' AND MECHANICS' NATIONAL BANK OF BUFFALO, *Plff. in Err.*,

v.

PETER C. DEARING.

(See S. C., 1 Otto, 29-31.)

National banks—State usury law—effect of.

1. The States can exercise no control over national banks, nor in anywise affect their operation, except in so far as Congress may see proper to permit.

NOTE.—Usury by national banks.

National banks are not bound by the usury laws of the States where they are located. *First Natl. Bk. of Columbus v. Garlinghouse*, 22 Ohio St., 492; S. C., 10 Am. Rep., 751; *Central Natl. Bk. v. Pratt*, 115 Mass., 539; S. C., 15 Am. Rep., 138; *Davis v. Randall*, 115 Mass., 547; S. C., 15 Am. Rep., 144.

Discounting a promissory note by a national bank at an unlawful rate of interest, does not ren-

2. The discount of a note by a national bank, at a greater rate of interest than is allowed by the statute of the State where such bank is located, does not render it liable to the penalty for usury provided by the state statute.

3. Such bank is entitled to recover the principal of the note, less the amount of the interest unlawfully reserved.

[No. 502.]

Submitted Oct. 12, 1875. Decided Oct. 25, 1875.

[N ERROR to the Court of Appeals of the State of New York.

The case is stated by the court.

Messrs. E. G. Spaulding and J. M. Humphrey, for plaintiff in error:

The penalty in this case should only be a forfeiture of the "entire interest" taken by the Bank, \$18.33, on the discount of the \$2,000 note. This is a forfeiture prescribed by the 30th section of the National Bank Act, which is the charter under which the Bank acted in discounting the note in this case. The national law creating a banking system for the United States, is complete in itself. It having been decided that Congress has the constitutional power to establish this general system of national banks, it necessarily follows that it can establish the rate at which they can discount paper, and a uniform penalty for reserving or taking a greater rate in all the States of the Union. It supercedes the state laws imposing penalties for usury, so far as applicable to national banks, and prevents hostile legislation in any of the separate States.

McCulloch v. Md., 4 Wheat., 316; Story, Com., sec. 439, 440; *Houston v. Moore*, 5 Wheat., 23; *Davis v. Randall*, 115 Mass., 547; *Bk. v. Pratt*, 115 Mass., 539; *Brown v. Bk.*, 72 Pa., 209; *Wiley v. Starbuck*, 44 Ind., 298; *Tiffany v. Bk.*, 18 Wall., 409 (85 U. S., XXI., 862); see *Justice Miller's op.*, *Bk. Mag.*, Dec., 1870, p. 416; *Cit. Nat. Bk., etc., v. Leming*, 8 Int. Rev. Rec., 132; *Bk. v. Garlinghouse*, 22 Ohio St., 492; *Bk. v. Lamb*, 57 Barb., 429.

Messrs. Thad. C. Davis, H. H. Wells and A. P. Nichols, for defendant in error:

The note in litigation being made upon an usurious consideration, is void in this State, unless its validity is preserved by section 30 of the Act of Congress of June 8, 1864, in respect to national banks. This Act, however, does not make the note valid:

1. Because it makes national banks subject in all respects to the state laws governing interest; and,

2. Congress has no power to pass an Act annulling a state usury law in cases like the one in hand, inasmuch as the exercise of such a power is not a necessary adjunct of the power to create banks, and it is not given specifically by the Constitution. No privilege of immunity from the usury laws of the State is conferred upon the national banks by the Act of Congress of 1864, 18 Stat. at L., 99, and a contract for the loan made in this State with one of these organizations, by which it reserves a greater rate of interest than seven per cent., is void.

Bk. v. Lamb, 50 N. Y., 95.

The power to create a corporation as an appropriate instrument for the execution of a constitutional power vested in the Federal Government, only carries with it authority to confer upon that corporation such privileges or immunities from the state laws as are necessary to enable it to effect the legitimate national object for which it is created. No such national object requires that national banks should exceed the rates of interest fixed by the States, and no immunity from state usury laws is, therefore, necessary.

License Tax cases, 5 Wall., 462, 470 (72 U. S., XVIII., 497, 500); *Bk. v. Commonwealth*, 9 Wall., 853 (76 U. S., XIX., 701); *Osborn v. Bk.*, 9 Wheat., 861.

Mr. Justice Swayne delivered the opinion of the court:

The question presented for our determination involves the construction of the provisions of the National Bank Act of Congress of the 3d of

der the note void, but only to the extent of the interest. *First Natl. Bk. of Columbus v. Garlinghouse*, 22 Ohio St., 492; S. C., 10 Am. Rep., 751; *Natl. Exch. Bk. v. Moore*, 2 Bond, 170; *Cit. Natl. Bk. v. Leming*, 8 Int. Rev. Rec., 132; *Shunk v. First Natl. Bk. of Gallon*, 22 Ohio St., 503; S. C., 10 Am. Rep., 762.

State courts have jurisdiction of actions against national banks to recover penalty for usurious interest. *Ordway v. Central Natl. Bk. of Balt.*, 47 Md., 21; S. C., 28 Am. Rep., 455; *Hade v. McVeigh*, 31 Ohio St., 231; *Claffin v. Houseman*, 98 U. S., 130, post; *Gruber v. First Natl. Bk.*, 19 Alb. L. J., 137; *Pickett v. Merch's Natl. Bk. of Memphis*, 32 Ark., 346; *Dow v. Insburgh Natl. Bk. of Orleans*, 50 Vt., 112; S. C., 23 Am. Rep., 493; *Bletz v. Col. Natl. Bk.*, 87 Pa. St., 7; 20 Am. Rep., 343.

National bank discounting business paper at greater rate than allowed by law, is liable to the forfeiture imposed by National Banking Act, although the transaction is not usurious. *Johnson v. Natl. Bk. of Gloversville*, 74 N. Y., 329; S. C., 30 Am. Rep., 312.

A bill in equity will not lie to recover usury from a national bank. *Hambright v. Natl. Bk.*, 3 Lea, 40; S. C., 31 Am. Rep., 629.

Director may defend against recovery of usurious interest. *Bk. of Cadiz v. Slemmons*, 34 Ohio St., 142; S. C., 33 Am. Rep., 364.

Payments made generally on a promissory note to a national bank, which note embraces illegal interest, will be applied in satisfaction of the principal. *Bk. of Cadiz v. Slemmons*, 34 Ohio St., 142; S. C., 33 Am. Rep., 364.

Taking greater rate of interest than allowed by law by a national bank does not entitle the person paying same to have it applied as a payment of so
See 1 Op. U. S., Book 23.

much of the principal in an action to recover principal. National Bank Act fixes rights of the parties. *Higley v. First Natl. Bk. of Beverly*, 26 Ohio St., 75; S. C., 20 Am. Rep., 759.

In an action upon a note usuriously discounted by a national bank, the amount of the usury may be set off by an accommodation indorser, although the note does not carry interest on its face. *Natl. Bk. of Auburn v. Lewis*, 73 N. Y., 516; S. C., 31 Am. Rep., 484.

No one can recover usurious interest paid to a National bank but the party who paid it, and it cannot be set off or recouped by another party to the contract. *Scott v. Leary*, 34 Md., 395; *Hough v. Horsey*, 36 Md., 184; *Lazear v. Natl. Union Bk. of Balt.*, 52 Md., 78; S. C., 36 Am. Rep., 355.

It cannot be set off or recouped at all, but the party is confined to his penal remedy. *Barnett v. Bk.*, 98 U. S., 555 (Book XXV); S. C., *Browne*, *Natl. Bk. Cas.*, 18; *Stephens v. Monongahela Bk.*, 111 U. S., 197, citing, with approval, the case annotated; *Driesbach v. Natl. Bk.*, 104 U. S., 52 (Book XXVI).

The National Banking Act subjects the bank to liability for taking usurious interest, but does not declare the contract of indorsement void, and no such penalty being prescribed, the courts cannot superadd it. *Oates v. Natl. Bk.*, 100 U. S., 239.

Where the laws of a State forbid a corporation to interpose a defense of usury, but fix the rate of interest at seven per cent., a national bank charging a corporation more than seven per cent. forfeits the interest. *In re Wild*, 11 Blatchf., 243.

Right of action to recover forfeiture for usury of a national bank, passes to the assignee in bankruptcy. *Crocker v. First Natl. Bk.*, 3 Am. L. T. Rep., N. S. 350.

June, 1864, 18 Stat. at L., 99, upon the subject of the interest to be taken by the institutions organized under that Act.

The plaintiff in error is one of those institutions. The 30th section of the Act declares "That every association may take, receive, reserve and charge, on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where, by the laws of any State, a different rate is limited for banks of issue organized under state laws, the rates so limited shall be allowed for associations organized in any such State under this Act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same, provided that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

The facts of the case are few and simple. On the 2d of September, 1874, it was agreed between the parties that Dearing should make his promissory note to one Deitman for \$2,000, payable one month from date, and that the Bank should discount the note for Dearing at the rate of interest of ten per cent. per annum. This agreement was carried out. The Bank received the note, and paid to Dearing the sum of \$1,981.67. The discount reserved and taken was \$18.33. The rate of interest which the Bank was legally authorized to take was seven per cent. per annum. The excess reserved over that rate was \$5.50. Dearing failed to pay the note at maturity. The Bank thereupon sued him in the Superior Court of Buffalo. He answered, that the agreement touching the discount was usurious, corrupt and illegal; that it avoided the note; and that he was in nowise liable to the plaintiff. The court sustained this defense, and gave judgment for the defendant.

At a general term of that court the judgment was affirmed, and the judgment of affirmance was subsequently affirmed by the Court of Appeals.

No searching analysis is necessary to eliminate the several provisions of the section to be considered to develop the true meaning of each, and to draw the proper conclusions from all of them taken together:

(1) The rate of interest chargeable by each

bank is to be that allowed by the law of the State or Territory where the bank is situated.

(2) When, by the laws of the State or Territory, a different rate is limited for banks of issue organized under the local laws, the rate so limited is allowed for the national banks.

(3) Where no rate of interest is fixed by the laws of the State or Territory, the national banks may charge at a rate not exceeding seven per cent. per annum.

(4) Such interest may be reserved or taken in advance.

(5) Knowingly reserving, receiving or charging "A rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon."

(6) If a greater rate has been paid, twice the amount so paid may be recovered back, provided suit be brought within two years from the time the usurious transaction occurred.

(7) The purchase, discount or sale of a bill of exchange, payable at another place, at not more than the current rate of exchange on sight drafts, in addition to the interest, shall not be considered as taking or reserving a greater rate of interest than that permitted.

These clauses, examined by their own light, seem to us too clear to admit of doubt as to anything to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject.

But it is contended that the phrase, "a rate of interest greater than aforesaid," as it stands in the context, has reference only to the preceding sentence, which relates to banks where no rate of interest is fixed by law; and that hence it leaves the consequences of usury, where such rate is fixed, to be governed wholly by the local law upon the subject. This, in the State of New York, would, in all such cases, render the contract a nullity, and forfeit the debt. Such the Court of Appeals held to be the law of this case, and adjudged accordingly.

Neither of these views can be maintained. The collocation of the terms in question does not grammatically require such a construction. Viewed in this light, the phrase is as much applicable to both the foregoing clauses as to the next preceding one. The point to be sought is the intent of the law-making power. The offense of usury under this section is as great where the local law does not as where it does define the rate of interest. The same considerations apply in both cases. Why should Congress punish in one class of cases and, so far as its action is concerned, exempt in the other? Why such discrimination? The result would be that in Pennsylvania, where the contract would be void only as to the unlawful excess, the Bank would lose nothing but such excess; while in New York, under a contract precisely the same, except as to the identity of the lender, the entire debt would be lost to the Bank. This would be contrary to the plainest principles of reason and justice.

A purpose to produce or permit such a state of things ought not to be imputed to Congress, unless the circumstances are so cogent as to render that result inevitable.

We find nothing within the scope of the subject of that character.

The second proposition: that the state law, including its penalties, would apply if the first proposition be sound, is equally untenable. If the construction contended for were correct, the state law would have no bearing whatever upon the case.

The constitutionality of the Act of 1864 is not questioned. It rests on the same principle as the Act creating the second Bank of the United States. The reasoning of Secretary Hamilton and of this court in *McCulloch v. Maryland*, 4 Wheat., 816, and in *Osborn v. Bk.*, 9 Wheat., 738, therefore, applies. The national banks organized under the Act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge.

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single State cannot give." Against the national will "the States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." *Osborn v. Bk.*, *supra*; *Weston v. Charleston*, 2 Pet., 466; *Brown v. Maryland*, 12 Wheat., 419; *Dobbins v. Erie Co.*, 16 Pet., 435.

The power to create carries with it the power to preserve. The latter is a corollary from the former.

The principle, announced in the authorities cited, is indispensable to the efficiency, the independence, and, indeed, to the beneficial existence of the General Government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every State in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of government may be divided into four classes:

Those which belong exclusively to the States;

Those which belong exclusively to the National Government;

Those which may be exercised concurrently and independently by both;

And those which may be exercised by the States, but only with the consent, express or implied, of Congress.

Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper occasion for its exercise shall recur. *Gilman v. Philadelphia*, 8 Wall., 713 [70 U. S., XVIII., 96]; *Ex parte McNiel*, 18 Wall., 240 [80 U. S., XX., 625].

The power of the States to tax the existing national banks lies within the category last mentioned.

See 1 Otto.

It must always be borne in mind that the Constitution of the United States, "and the laws which shall be made in pursuance thereof," are "the supreme law of the land" (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people, as its own local constitution and laws.

In any view that can be taken of the 80th section, the power to supplement it by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion.

There was reason why the rate of interest should be governed by the law of the State where the bank is situated; but there is none why usury should be visited with the forfeiture of the entire debt in one State, and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of Congress.

Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess. *Burnhisel v. Firman*, 22 Wall., 170 [89 U. S., XXII., 766]; *Turner v. Calvert*, 12 Serg. & R., 46. Forfeitures are not favored in the law. Courts always incline against them. *Marshall v. Vicksburg*, 15 Wall., 146 [82 U. S., XXI., 121]. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred. Vattel, 29th Rule of Construction.

Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. *Stafford v. Ingersol*, 3 Hill, 38; *Bk. v. Lamb*, 57 Barb., 429.

The 80th section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it. *Gray v. Bennett*, 8 Met., 522, 529.

The 46th section of the Banking Act of Feb. 25, 1863, 12 Stat. at L., 679, declared that reserving or taking more than the interest allowed should "be held and adjudged a forfeiture of the debt or demand." In the Act of 1864, 13 Stat. at L., 108, the forfeiture of the debt is omitted, and there is substituted for it the forfeiture of the interest stipulated for, if it had only been reserved, and the recovery of twice the amount where the interest had been actually paid.

In the Revised Statutes of the United States of the 22d of June, 1874, 1011, the provisions of the 80th section of the Act of 1864 are divided into two sections, and the language is so changed as to render impossible in that case the same construction as that of the 80th section contended for by the counsel of the defendant in error in this case.

In the "Act to Amend the Usury Laws of the District of Columbia," of the 22d of April, 1870, 16 Stat. at L., 91, it is provided that six per cent. per annum shall be the lawful rate of interest, but that parties may contract for ten per cent.; and that, if more than ten per cent. be contracted for, the entire interest shall be forfeited, and that only the principal debt shall be recoverable. It is further declared, that, if the unlawful interest has been paid, it may be

recovered back, provided it be sued for within a year.

It is declared in the last section that this Act shall not affect the Banking Act of 1864.

This later legislation shows the spirit by which Congress was animated in passing the 80th section of the Act here under consideration, and is not without value as affording light whereby to ascertain the true meaning of that section, if there could otherwise be any doubt upon the subject.

This section has been elaborately considered by the highest court of Massachusetts, of Pennsylvania, of Ohio and of Indiana. *Davis v. Randall*, 115 Mass., 547; *Bk. v. Pratt*, 115 Mass., 589; *Brown v. Bk.*, 72 Pa., 209; *Bk. v. Garlinghouse*, 22 Ohio St., 492; *Wiley v. Starbuck*, 44 Ind., 298. In all these cases, views were expressed in conflict with those maintained in the *Bk. v. Lamb*, 50 N. Y., 100. This adjudication controlled the result of the litigation between these parties.

Upon reason and authority, we have no hesitation in coming to the conclusion that there is error in the case before us.

The plaintiff below was entitled to recover the principal of the note sued upon, less the amount of the interest unlawfully reserved. Whether he was entitled to recover interest upon the amount of the principal so reduced, after the maturity of the note, is a point which has not been argued, and upon which we express no opinion.

The judgment of the Court of Appeals is reversed, and the case will be remanded, with directions to proceed in conformity with this opinion.

Cited—95 U. S., 685; 98 U. S., 490, 558; 100 U. S., 250; 111 U. S., 199; 2 Flipp., 66; 87 Pa. St., 92, 94; 81 Ohio St., 237; 62 Ala., 292; 34 Am. Rep., 18; 3 Lea, 41; 81 Am. Rep., 629; 47 Md., 241; 28 Am. Rep., 454, 463; 130 Mass., 521; 39 Am. Rep., 475; 75 N. Y., 522; 81 Am. Rep., 486; 87 Pa. St., 94; 80 Am. Rep., 345, 348; 23 W. Va., 557; 46 Am. Rep., 523.

JAMES BROWN ET AL., *Appts.*

ENOCH PIPER.

(See S. C., 1 Otto, 37-44.)

Application of old process, when not patentable—evidence in—judicial notice.

1. The application of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original, is not patentable.

2. Evidence of the state of the art is admissible in actions at law under the general issue without a special notice, and in equity cases, without any averment in the answer touching the subject.

3. Courts will take notice of whatever is generally known within the limits of their jurisdiction. [No. 29.]

Argued Oct. 19, 1875. Decided Nov. 1, 1875.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

This was an action brought in the court below by the appellee, Piper, for the alleged infringement of two letters patent. Judgment was entered on the report of a master in favor of the complainant, and the defendants appealed to this court.

The case is stated in the opinion.

Messrs. Geo. Gifford and Edward Avery, for the appellants.

Mr. Causten Browne, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

The bill is founded upon two patents granted by the United States to the appellee—one numbered 732, of the 19th of March, 1861; the other numbered 36,107 and dated Aug. 5, 1862. The second and later patent was not relied upon in the argument here and may, therefore, be laid out of view. Our attention will be confined to the prior one. It is declared in the specification to be "for a new and improved method of preserving fish and meats." The invention is alleged to consist "in a method of preserving fish and other articles in a chamber, and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed." The specification continues: "I do not profess to have invented the means of artificial congelation, nor to have discovered the fact that no decay takes place in animal substances so long as they are kept a few degrees below the freezing point of water; but the practical application of them to the art of preserving fish and meats, as above described, is a new and very valuable improvement. The apparatus for freezing fish and keeping them in a frozen state may be constructed in various ways and of different shapes. The apparatus shown in the drawing, however, will suffice to illustrate the principle and mode of operation."

The process and apparatus are then described as follows: a box of wood or other suitable material, surrounded by a packing of charcoal or other non-conducting substance, is to be provided, and the fish in small quantities laid in it on a rack. Metallic pans filled with a freezing mixture, such as salt and ice, are then to be set over them, and a cover shut over the pans. "In about twenty-four hours, the freezing mixture having been changed once in twelve hours, the fish will be frozen completely through."

After being frozen, the fish or meat may, if desired, be covered with a thin coating of ice; and this coating may be preserved by applying the substances named, which will exclude the air, and prevent the juices from escaping by evaporation. "The fish are then to be packed closely in a large preserving box, which is inclosed in a still larger box; the space between the boxes being filled with charcoal or other non-conducting material, to exclude the heat." Other minor details are described, which it is not deemed material to repeat. The patentee then declares: "I do not desire to be understood as confining myself to the specific apparatus above described, nor to the use of either or both the preliminary processes of freezing and cooling; but I have described the mode of operation, which, by experience, I have found best for preserving the most delicate varieties of fish." The summation and claim are: "Having described my invention, what I claim as new, and desire to secure by letters patent, is, preserving fish or other articles in a close chamber by means of a freezing mixture, having no

contact with the atmosphere of the preserving chamber, substantially as set forth."

The patent is not for the principle long and well known to physicists, that a low degree of cold, like a high degree of heat, prevents the decay of animal matter; nor is it for the freezing of the articles to be preserved before or after they are placed in the preserving chamber; nor is it for applying, by means of an apparatus with any particular details of construction, cold to the articles to be preserved; nor is it for the frigorific effect of the freezing mixture upon the atmosphere of the inner chamber; but it is for the application to such articles of the degree of cold necessary to preserve them, by means of "a close chamber," in which they are to be placed, and "a freezing mixture having no communication with the atmosphere of the preserving chamber."

If this result be reached by the means designated in any way substantially the same with that described, having the feature of the non-contact of the freezing mixture with the air of the preserving chamber, there is a clear invasion of the territory which the patentee has marked out and seeks to appropriate to himself.

It was earnestly maintained by the learned counsel for the appellee that the essence of the invention is the creation of "a freezing atmosphere" in the preserving chamber.

To this there are several answers. There is nothing in the specification or claim to warrant the proposition. The direction is, that "the fish are to be packed closely." This implies clearly that as many fish are to be put into the preserving chamber as it can be made to contain.

Atmospheric air is itself an agent of decay; and in all such cases it is important to preclude, as far as possible, its presence and contact. "If air be absolutely excluded, putrefaction ceases; and the result is the preservation of the substance in some circumstances, perhaps in all." 3 Ure's Dict. of Arts, 548. "On this principle is founded Appert's process, by which easily decomposable articles of food and drink, such as meat, fish, vegetables, milk, etc., are preserved for years, viz.: by packing them in air-tight bottles or soldered tin cans, heating the vessels for several hours in boiling water, and keeping them carefully closed." 2 Watts' Dict. of Chem., 625. The patentee is to be presumed to have known this property of air.

The patent is for "a new and useful improvement" in the art to which it relates. It was issued under the Act of July 4, 1836, 5 Stat. at L., 117. The rights of the parties are to be considered in the light of that Act. The defense relied upon in the answer is the want of novelty; and several instances of prior use and knowledge, with the requisite circumstances of time, place and persons, are alleged.

We deem it sufficient to consider one of them. On the 17th of August, 1842, a patent was issued to John Good "for a corpse preserver." The apparatus, as described, was an outer case with a close-fitting lid. The case was made double; there being a partition to within four or five inches, more or less, of the top of the outer one, leaving a space between the two of several inches, which was to be filled with ice. There was a false bottom with holes in it in the inner compartment. It rested upon ledges,

See 1 Otto.

which kept it four or five inches above the bottom. The intervening space was a receptacle for ice. The corpse was deposited upon the false bottom. A tray was placed over it, and under the lid. The tray was four or five inches deep, used to contain the freezing mixture, and had a flange to prevent the mixture from escaping. Proper outlets were provided for the passage of the water from the melting ice. There was no communication between the tray containing the freezing mixture and the inner compartment containing the body. Swartz, an intelligent and unimpeached witness, was examined on the 15th of October, 1869. He testified that he was an undertaker, and had used the apparatus for about twenty years, sometimes with ice under the false bottom and sometimes without it. In either case he applied a sufficient degree of cold to prevent putrefaction before interment. He thought the bodies were sometimes frozen, but was not certain. The material point in his business was the prevention of decay for the time being; and that was always accomplished.

Here was the application of the requisite degree of cold, exactly in the manner called for in the specification of the appellee.

This is hardly denied; but it is insisted that the process was never applied by the witness to the preservation of fish and meats.

The answer is that this was simply the application by the patentee of an old process to a new subject, without any exercise of the inventive faculty and without the development of any idea which can be deemed new or original in the sense of the patent law. The thing was within the circle of what was well known before, and belonged to the public. No one could lawfully appropriate it to himself and exclude others from using it in any usual way for any purpose to which it may be desired to apply it.

This is fatal to the patent. *Ames v. Howard*, 1 Sumn., 487; *Howe v. Abbott*, 2 Story, 194; *Bean v. Smallwood*, 2 Story, 411; *Winans v. R. R. Co.*, 2 Story, 412; *Hotchkiss v. Greenwood*, 11 How., 248.

There is another view of the case that may properly be taken.

Evidence of the state of the art is admissible in actions at law under the general issue without a special notice, and, in equity cases, without any averment in the answer touching the subject. It consists of proof of what was old and in general use at the time of the alleged invention. It is received for three purposes and none other—to show what was then old, to distinguish what was new, and to aid the court in the construction of the patent.

Of private and special facts, in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge. But there are many things of which judicial cognizance may be taken. "To require proof of every fact, as that Calais is beyond the jurisdiction of the court, would be utterly and absolutely absurd." *Gres. Eq. Ev.*, 294. Facts of universal notoriety need not be proved. See, *Taylor, Ev.*, sec. 4, n. 2. Among the things of which judicial notice is taken, are: the law of nations; the general customs and usages of merchants; the notary's seal; things which must happen ac-

according to the laws of nature; the coincidences of the days of the week with those of the month; the meaning of words in the vernacular language; the customary abbreviations of Christian names; the accession of the Chief Magistrate to office and his leaving it. In this country, such notice is taken of the appointment of members of the cabinet, the election and resignations of senators and of the appointment of marshals and sheriffs, but not of their deputies. The courts of the United States take judicial notice of the ports and waters of the United States where the tide ebbs and flows, of the boundaries of the several States and judicial districts, and of the laws and jurisprudence of the several States in which they exercise jurisdiction. Courts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him. See, 1 Greenl. Ev., 11; Gres. Eq. Ev., *supra*; and Taylor, Ev., sec. 4, and *post*.

In *The Ohio L. & T. Co. v. Debolt*, 16 How., 435, it was said to be "a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of companies" of the classes named, is prepared and passed under the circumstances stated. In *Hoare v. Silverlock*, 12 Ad. & Ell. (N. S.), 624, it was held that where a libel charged that the friends of the plaintiff had "realized the fable of the frozen snake," the court would take notice that the knowledge of that fable existed generally in society. This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.

The pleadings and proofs in the case under consideration, are silent as to the ice-cream freezer. But it is a thing in the common knowledge and use of the people throughout the country. Notice and proof were, therefore, unnecessary. The statute requiring notice was not intended to apply in such cases. The court can take judicial notice of it and give it the same effect as if it had been set up as a defense in the answer and the proof were plenary. See, *Glus Co. v. Upton*, 6 Pat. Off. Gaz., 848, and *Needham v. Washburn*, 7 Pat. Off. Gaz., 651—both decided by Mr. Justice Clifford upon the circuit. We can see no substantial diversity between that apparatus and the alleged invention of the appellee. In the former, as in the apparatus of the appellee, "the freezing mixture" has "no contact with the atmosphere" of the chamber where the work is to be done. If the freezer be full and the preserving chamber be full, there would be room for but little air in either. If either were only partially full, the vacuum would be filled with that substance. The cold is generated by the same materials and applied under the same circumstances. If the cream were taken out of the freezer and fish put in, there would be, in all substantial respects, the same apparatus, process and result. If the preserving chamber were as tight as the freezer, either might be convertibly used for the purpose of the other.

"The preservative effect of cold, and espe-

cially of dry cold, is well known and exemplified in the keeping of meat and fruit in ice-houses. Animals have been found undecomposed in the ice of Siberia which belong to extinct species, and which must have been embalmed in ice for ages." Tit. "Antiseptic," 1 Amer. Encyclo., 570.

Artificial freezing is usually applied to water and articles of food.

"There are two general methods of effecting it, viz.: by liquefaction and by vaporization and expansion. The method by liquefaction is performed by freezing mixtures, which are formed by mixing together two or more bodies, one or all of which may be solid. They are used together in vessels having three or more concentric apartments—an inner one, containing the article to be frozen; one eccentric to this, containing the freezing mixture, provided with some contrivance for agitation; one, again, outside of this, filled with a non-conductor of heat, as powdered charcoal, gypsum or cotton wool; and sometimes one between them for holding water." Tit. "Freezing," 7 Amer. Encyclo., 474.

Here the principle and substance of the appellee's claim are set forth as belonging to the general domain of knowledge and science. It is known that Lord Bacon applied snow to poultry to preserve it. He said the process succeeded "excellently well." The experiment was made in his old age, imprudently, and brought on his last illness.

Examined by the light of these considerations, we think this patent was void on its face and that the court might have stopped short at that instrument and, without looking beyond it into the answers and testimony, *sua sponte*, if the objection were not taken by counsel, well have adjudged in favor of the defendant.

These views render it unnecessary to consider the exceptions to the master's report.

The decree of the Circuit Court is reversed and the cause will be remanded, with directions to dismiss the bill.

Cited—94 U. S., 198; 99 U. S., 201, 503; 102 U. S., 378, 419; 107 U. S., 632; 109 U. S., 101, 102; 110 U. S., 494; 111 U. S., 606; 16 Blatchf., 189; 17 Blatchf., 401, 483; 4 Sawy., 287; 5 Sawy., 561.

ENOCH PIPER, *Appt.*,

v.

GEORGE T. MOON ET AL.

(See S. C., 1 Otto, 44.)

The case of *Brown v. Piper*, *ante*, 300, is the same as to its facts as this case, and the decision in that case governs this.

[No. 80.]

Argued Oct. 19, 20, 1875. Decided Nov. 1, 1875.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case sufficiently appears in the opinion in this and the preceding case.

Mr. Causten Browne, for appellant.

Mr. Geo. Gifford, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

The appellant's bill in this case is founded upon the same patent as the bill of the appellee in case No. 29, just decided. *Brown v. Piper*, [ante, 200].

In this case the court below dismissed the bill, and the complainant appealed to this court. What was said in No. 29 disposes of this case. *The decree of the Circuit Court is affirmed.*

C. W. UPTON, Assignee of THE GREAT WESTERN INSURANCE COMPANY, a Bankrupt, *Plf. in Err.*,

v.

J. D. TRIBILCOCK.

(See S. C., 1 Otto, 45-56.)

Stockholders of corporations, liability of—when not released—contract—misrepresentation of the law does not vitiate—laches.

1. A contract between a company or its agents and the stockholders, limiting their liability as to unpaid installments of stock, is void as to creditors of the company, and as to the rights of the assignee who represents the creditors.

2. The acceptance and holding of a certificate of shares in a corporation makes the holder liable to the responsibilities of a shareholder.

3. The obligation of a subscriber to the capital stock of a corporation to pay his subscription, cannot be released or surrendered to him by the trustees of the company.

4. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.

5. A misrepresentation of the law, as a misrepresentation as to the liability to assessment of a stockholder, will not vitiate a contract where there is no misunderstanding of the facts.

6. Parties who claim to be relieved on the ground of fraud, must act with the utmost diligence and promptitude in discovering the fraud and in claiming to be relieved by reason of it, and whether they have so acted, is a question of fact for the jury.

[No. 482.]

Submitted Oct. 13, 1875. Decided Nov. 1, 1875.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Mr. C. C. Nourse, for plaintiff in error:

It is a principle, now regarded as elementary, that the capital stock of a corporation is a trust fund for the benefit of the public, which deals with it and which becomes its creditors. Its amount is heralded to the world as the badge of its strength and reliability, and though its stockholders personally may be unknown to the public, yet the public deals with it, and has a right to deal with it, upon the assumption that the stock is held by responsible and solvent individuals, who hold such stock in good faith, and by virtue of valid contracts therefor.

Curran v. Ark., 15 How., 804; 2 Story, Eq. Jur., sec. 1252; *Wood v. Dummer*, 8 Mas., 308; *Ang. & Ames, Corp.*, par. 599-604; *Ogilvie v. Ins. Co.*, 23 How., 380 (63 U. S., XVI., 849); *Adler v. Milwaukee, etc., Co.* 13 Wis., 57; *Sawyer v. Hoag*, 17 Wall., 610 (84 U. S., XXI., 731).

As a necessary consequence of this doctrine, it is also true that no arrangement, agreement, device or artifice between the company and its stockholders, the effect of which is to deprive the creditor of the corporation of the benefit of this fund or any portion of it, is valid as

against the creditors, and this doctrine is, also well settled upon authority.

Sawyer v. Hoag, *supra*; *Sles v. Bloom*, 19 Johns, 477; *Mann v. Cooke*, 20 Conn., 188; *Sagory v. Dubois*, 3 Sandf. Ch., 466; *Upton v. Hansbrough*, 8 Biss., 417; *Psychaud v. Hood*, 28 La. Ann., 782; *Adler v. Milwaukee, etc., Co.* (*supra*); *Nathan v. Whitlock*, 9 Paige, 152; *Mangles v. Grand Collier, etc.*, 10 Sim., 519; *Society, etc., v. Abbott*, 2 Beav., 559; *Locke's case*, L. R. 11 Eq., 99; *In re Disderi & Co.*, L. R. 11 Eq., 245.

The defendant in this case is in no different situation from that of any other stockholder, as to this question. There was no false representation of any fact made to him. He received just such a contract as he agreed for, as did all the rest. His plea is, that he was deceived and misled as to the legal effect of his contract.

It is a well settled principle of law, that a misrepresentation as to the legal effect of a written agreement which a party signs with a full knowledge of its contents, is not a sufficient ground at law for avoiding the agreement.

Kerr, Fraud and M., 90; *Platt v. Scott*, 6 Blackf., 389; *Russell v. Branham*, 8 Blackf., 277; *Starr v. Bennett*, 5 Hill, 308; *Fish v. Cleland*, 33 Ill., 288; *Clem v. Newcastle, etc., R. R. Co.*, 9 Ind., 488; *Martin v. Wharton*, 38 Ala., 687.

Upon the proposition that this is a suit for the benefit of the creditors, and that the assignee in bankruptcy represents the creditors and their rights, it is only necessary to cite the case of *Sawyer v. Hoag* (*supra*), recently decided by this court.

Bk. v. Church, 29 Conn., 187; see, *Oakes v. Turquand*, 2 L. R. H. L. Cas., 851; *Henderson v. Royal British Bank*, 7 El. & Bl., 356; *Lawrence's case*, 2 Law Rep. Ch., 412; *Wilkinson's case*, 2 Law Rep., 536.

Messrs. Geo. G. Wright and Trimble & Carruthers, for defendant in error:

The assertion was that, under the laws of Illinois, the Company had this power. No particular law was spoken of. Defendant of course supposed that these agents meant that there was a statute authorizing it. There was no suggestion as to doubts or difficulties about the meaning of any statute. The agents meant to convey the idea that there was such a law; that there was no doubt about this, because Chicago lawyers said so.

Even if the false statement was with reference to a law, and was nothing else, we think it would make no difference. This was a foreign law, and defendant would not presume to know of its existence, nor of its legal effect. Foreign laws must be proved even in our courts.

Greenl., sec. 486.

The States are foreign as to each other.

1 *Greenl.*, secs. 489-504; *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 8 Wheat., 234; *Brackett v. Norton*, 4 Conn., 517; *Packard v. Hill*, 2 Wend., 411.

If the courts will not take judicial notice of foreign laws, *a fortiori* citizens will not be presumed to know them.

It is, however, insisted, that defendant being a stockholder in the Great Western Company was bound to know the law of its organization. There are some facts material to be considered in connection with this point, and we beg leave to remind the court that defendant in his an-

answer denies that he ever signed any stock-book or register of the Great Western Ins. Company, or authorized any other person to do so for him; that he ever had anything, in fact, to do with it till after his note was found in Chicago in 1871, when he sent an agent to Chicago to tender back his stock and demand his note; that he never met with its stockholders, or was in any way connected with its affairs. There is nothing in the record in this case to show that he was even nearer to Chicago than Bloomfield, Iowa, until in June 1871. Does the fact that he had in his possession the certificate referred to, raise a conclusive presumption that he knew all about the charter of the company and the general law of Illinois governing such Company?

Central Railway Company of Venezuela v. Kich, 2 L. R. H. L. Cas., 99 (Eng. and Irish Appeals), 12 Eq., 380; also Law Rep., 7th Ch., 55; *Smith's case*, L. R. 2 Ch., 608; *Ship's case*, 3 L. R. H. L. Cas., 848; *Lawrence's case*, L. R., 2 Ch., 412; *McNiell's case*, L. R. 10 Eq., 505.

It is further insisted that even if there was fraud proved by legal evidence, defendant cannot plead it as against a creditor.

But see *Smith's case* (*supra*); *McNiell's case* (*supra*); *Wright's case*, L. R., 12 Eq., 380 (S. C.); L. R., 7 Ch. App., 55.

Did defendant sufficiently repudiate? For the purpose of discussing this question we shall assume that there was a fraud, and this the jury found, and that such fraud made the contract voidable, even as against creditors. In that state of the case we admit that defendant, when he discovered the fraud, would have to repudiate within a reasonable time, or else he waived it.

The instructions on this point were as favorable to the plaintiffs as they were entitled to. *Stedman v. Euleth*, 6 Met., 114.

Mr. Justice Hunt delivered the opinion of the court:

Two points are presented in this case. Upon the first point, the facts are as follows:

The plaintiff, as assignee of the Great Western Insurance Company, a bankrupt corporation, organized under the statute of the State of Illinois, brought his action against the defendant, alleging that he was a stockholder of said corporation to the amount of \$10,000; that twenty per cent. only had been paid upon his stock; alleging also the bankruptcy of the company, the appointment of the plaintiff as assignee, and the demand of the amount claimed, and seeking to recover the \$8,000 remaining unpaid. The complaint averred that the defendant did verbally agree to become such stockholder, and with intent to become such, did accept a certificate for the same, whereby he became bound to pay the full amount thereof, as follows: five per cent. upon delivery of the certificates; five per cent. in three months; five per cent. in six months; five per cent. in nine months; and the residue whenever called for by the Company, according to the charter of the Company and the laws of the State of Illinois.

The defense is, that the subscription was obtained by the fraudulent representations of the agent of the Company to the effect that the defendant would only be responsible for twenty per cent. of the subscription made by him; that afterwards he executed his promissory note for the twenty per cent., and secured the same by

a mortgage of real estate; "And that thereupon (in the language of the answer), and pursuant to agreement, said subscription contract was surrendered and delivered up to defendant;" and also in the language of the answer, "That said note was a full payment and discharge of all obligations and personal liabilities of all kinds whatsoever by reason of his contract so made and the relations created by the delivery to him of said certificate and said note was received in full payment."

In his third amended answer, the defendant avers that he did subscribe for stock on the conditions mentioned; that after that contract was made, and before a certificate was delivered to him, and before executing his note, an agreement was made with Overton on behalf of the Company to the effect before stated; and thereupon he made and delivered the note and mortgage which was received by Overton in full discharge and payment of the amount due on his said subscription.

The evidence contained in the bill of exceptions leaves the case substantially as is averred in the pleadings. The defendant offered evidence tending to prove representations that twenty per cent. only was required to be paid; that eighty per cent. was non-assessable, and created no personal liability; that the agent, Overton, exhibited a blank form of certificate with the word "non-assessable" printed across the face, "being a copy similar to that subsequently filled up and delivered to defendant by Overton." It appears, that, before the defendant made his subscription, a copy of the charter and by-laws had been furnished to him by Overton; and that, in returns made by the Company to the Auditor of the State of Illinois of the amount of "unpaid subscribed capital for which the subscribers were liable," the amount of the defendant's note was included.

The case standing in this position upon the pleadings and the evidence, the plaintiff requested the court to charge the jury as follows:

2. That any contract between the Company or its agents and the stockholders, limiting their liability as to unpaid installments of stock, is void as to creditors of the Company, and as to the rights of the assignee who represents the creditors in this action.

3. That if the jury find from the evidence that the defendant, J. D. Tribilcock, became a stockholder of the Great Western Insurance Company in the month of August, 1870, and that he continued to own and hold said stock until after the insolvency of the Company in February, 1873, that any representations by any agent of the Company at the time defendant became such stockholder as to the matter of his liability for eighty per cent. of the stock, or any indorsement on the stock, of the word "non-assessable," are wholly immaterial, and constitute no defense to this action.

This request was refused.

It is hardly necessary to argue the proposition, that if the defendant became a holder of shares of the capital of this Insurance Company to the amount of \$10,000, and had paid but twenty per cent. thereof, its creditors were entitled to require of him the payment of the eighty per cent. remaining unpaid. The acceptance and holding of a certificate of shares in a corporation makes the holder liable to the

responsibilities of a shareholder. *Brigham v. Mead*, 10 Allen, 245; *R. R. Co. v. Dudley*, 14 N. Y., 336; *Seymour v. Sturges*, 26 N. Y., 184. The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a foot-ball to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion, that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the Company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received. *Sawyer v. Hoag*, 17 Wall., 610 [84 U. S., XXI., 781]; *Tuckerman v. Brown*, 33 N. Y., 297; *Ogilvie v. Ins. Co.*, 23 How., 380 [63 U. S., XVI., 349]; *Osgood v. Laytin*, 3 Keyes, 521; *S. C.*, 37 How. Pr., 63, affg. *S. C.*, 48 Barb. 463; *Gross*, Ill. Stat., p. 856, sec. 16.

We are of the opinion that the alleged representation of the non-assessability of the stock held by him was quite immaterial. It was so held in *Ogilvie v. Ins. Co.* [*supra*].

Again; if full effect is given to the evidence of the defendant and to his claim in this respect, it shows this, and nothing more: he became a stockholder under a certificate signed by the president and secretary that he was entitled to one hundred shares of the stock of \$100 each, payable five per cent on receipt of the certificate; five per cent in three months; five per cent in six months; five per cent in nine months from date; the time or manner of the payment of the residue not being specified. Upon the face of this certificate were stamped in red ink the figures "\$100," and in another place was stamped the word "non-assessable." This certificate he held until the insolvency of the Company in 1873 was known to him.

The legal effect of this instrument was to make the remaining eighty per cent. payable upon the demand of the Company. We see no qualification of this result in the word "non-assessable," assuming it to be incorporated into and to form a part of the contract. It is quite extravagant to allege that this word operates as a waiver of the obligation created by the acceptance and holding of a certificate to pay the amount due upon his shares. A promise to take shares of stock imports a promise to pay for them. *Palmer v. Lawrence*, 8 Sand. (S. C.), 161; *Brigham v. Mead*, 10 Allen, 245. An acceptance and holding of a certificate has the same effect—(authorities *supra*). At the most, the legal effect of the word in question is a stipulation against liability to further taxation or assessment after the holder shall have fulfilled his contract to pay the one hundred per cent. in the manner and at the times indicated. We cannot

give to it the consequence of destroying the legal effect of the certificate.

Still, again; the representations relied upon as a defense, it will be noticed, were as to the legal effect of the defendant's subscription and certificate. It is alleged that the agent represented that, by the laws of the State of Illinois and by the charter of this Company, the defendant might become a subscriber to the amount of \$10,000; and, by means of a certificate to be given to him like that exhibited, he would really be liable only to the extent of one fifth of his said subscription, and that good lawyers had given their advice to this effect.

There was here no error, mistake or misrepresentation of any fact. The defendant made the subscription he intended to make, and received the certificate he had stipulated for; and, as there is no evidence to the contrary, it is to be presumed the good lawyers advised as was stated; but, in law, the defendant incurred a larger liability than he anticipated. *Leavitt v. Palmer*, 8 N. Y., 19.

He had received, several days before this time a copy of the charter and by-laws of the Company, and then had them in his possession. The 25th section of the by-laws was as follows: "Every person who shall subscribe for \$10,000 of stock, and pay twenty per cent. thereof, shall be constituted a director of this company, and shall continue such director so long as he shall retain of such stock an amount equal to \$10,000; but such \$10,000 shall not be reckoned in the election of other directors."

It was under this section and the succeeding one, authorizing the establishment of a branch in any place where such subscription was made, and by which the defendant became a director and might be president thereof, that the transaction took place.

That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission. *Jackson v. Croy*, 12 Johns., 427; *Lies v. Stub*, 6 Watts., 48; *Farley v. Bryant*, 32 Me., 474; *Coffing v. Taylor*, 16 Ill., 457; *Stapylton v. Scott*, 13 Ves., 427; *Alvanley v. Kinnaird*, 3 MacN. & G., 7; *Burgess v. Richardson*, 29 Beav., 490.

That a misrepresentation or misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts, is well settled.

In *Fish v. Cleland*, 33 Ill., 243, the principle is expressed in these words: "A representation of what the law will or will not permit to be done, is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such." See, *Star v. Bennett*, 5 Hill, 803

Lewis v. Jones, 4 B. & C., 506; *Rashdall v. Fbrd*, L. R. 2 Eq., 750.

The law is presumed to be equally within the knowledge of all parties.

That a stockholder may relieve himself from his liability by proof that he was misinformed as to the effect of his contract when he made it, would be a disastrous doctrine.

That a defendant, who could not by contract lawfully relieve himself from liability as a stockholder, can accomplish that result by proof that it was fraudulently represented to him that he could so relieve himself, would be strange indeed. *Ogilvie v. Ins. Co.* [*supra*].

The rule, that a mistake of law does not avail, prevails in equity as well as at common law. *Bk. v. Daniel*, 12 Pet., 32; *Hunt v. Rousmaniere*, 1 Pet., 1; *S. O.*, 8 Wheat., 174; *Mellish v. Robertson*, 25 Vt., 603; *Leavitt v. Palmer*, 3 N. Y., 19.

"If ignorance of law was admitted as a ground of exemption, the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible; for in almost every case ignorance of law would be alleged and the court would, for the purpose of determining this point, be often compelled to enter upon questions of fact insoluble and interminable." Austin, Jour., Vol. II., p. 172; Kerr, 397.

A statement that the Insurance Company had consulted with good lawyers, and that their opinion was as stated, should have been clear proof to the defendant that a representation of the law was a matter of opinion only.

We think the judge erred in not charging as was requested.

The facts upon which the second point arises are these: assuming that fraudulent representations had been made to the defendant respecting his non-liability for the eighty per cent., and that they were of a character that might relieve him from his contract, it was objected that he had not used proper diligence in discovering the fraud and in repudiating his contract. The transaction took place in August, 1870; and the defendant himself gave evidence "That he never suspected any liability as to said eighty per cent. or that the said representations as to the laws of Illinois were false, until the agent of the assignee made a demand upon him for the eighty per cent. in the year 1873; and that, as no claim had been made upon him, he never made any investigation as to the truth of such representations until after said demand in 1873." In February, 1871, the defendant did ask for a rescission of his contract, on the untenable ground that it had been fraudulently represented to him that his note should be retained and held in Bloomfield, Iowa; which representation had been violated by a sale of the same, and a removal thereof to the City of Chicago. The defendant is explicit and emphatic in his evidence that this attempted repudiation "was based wholly on what was represented" as to the intended disposition of the notes and mortgage.

The plaintiff thereupon requested the court to charge the jury as follows:

"7. That if he, defendant, offered to surrender his stock to the officers of the Company, but not upon the ground that he had been induced to subscribe for the stock upon a fraudulent representation as to his liability for the eighty per

cent., but upon another ground—to wit: that the Company had sold and assigned his note and mortgages—then the evidence of such offer is immaterial, and the evidence of fraud as to such misrepresentations as to his liability for the eighty per cent. cannot be made available in this suit, and constitutes no defense in this action.

12. That, if defendant was induced, in August, 1870, to become a stockholder of the Great Western Insurance Company by a representation of the agent of the Company that eighty per cent. of the stock was non-assessable, and that the laws of the State of Illinois allowed the Company to make such contract with those who took stock, then it was the duty of the defendant to use reasonable diligence to ascertain the truth of such representations, and to ascertain what the law of Illinois was on that subject; that if he did not do so within a reasonable time, and did not ascertain the truth of said matter until after the insolvency of the Company in 1873, then he cannot, as to the creditors of the Company, maintain any defense by means of such representations. The court instructs you, as matter of law, that the defendant could have ascertained the truth of such representations within a few months from the time they were made, and that not doing so is negligence on the part of the defendant that bars such defense as to the assignee."

The defense arising from the alleged promissory representations that the note and mortgage of the defendant should not be removed from Bloomfield, but should be retained in charge of the branch of the Company at that place, was frivolous, and was practically abandoned on the trial. The case was submitted to the jury solely on the question arising upon the representations of the non-assessability of the eighty per cent. The attempted rescission on account of the representation as to non-removal and its violation was, however, unfortunately introduced into the charge in a manner that prejudiced the right of the plaintiff.

The requests as above stated were declined; but the judge charged the jury as follows: that, "As respects creditors, the law requires of one, who has been drawn by fraud into the purchase of stock, that he shall be guilty of no negligence or want of reasonable care in discovering the fraud and, on discovering it, promptly repudiating the purchase. If you find from the evidence, that, within a few months after receiving the stock certificate, the defendant, discovering that he had been deceived in some respects, procured the agent who had obtained his certificate to go to Chicago, delivering to such agent his stock certificate, and instructed the agent to surrender up the stock and demand back the note for twenty per cent.; and if the agent accordingly went to Chicago, and offered to the Company to surrender the stock and rescind the contract, which the Company refused; and if you find that the defendant never afterwards acquiesced in being a member of the Company, that in September, 1871, he brought an action of replevin for the note, based on the ground of fraud; and if afterwards he refused to receive any dividend; and if all this took place before bankruptcy or insolvency of the Company—I instruct, that, in point of law, this is a sufficient repudiation of the contract to become a stockholder to enable defendant, living in another

State, to resist an action for the payment of the eighty per cent., provided you find that defendant was induced to become a stockholder by fraud, as before explained, and also further find, in view of all the circumstances, that defendant was not unreasonably negligent in discovering the fraud, and was guilty of no want of reasonable diligence in taking steps to repudiate the transaction."

To this charge the plaintiff excepted.

The general principles set forth in this charge are no doubt sound. If the alleged promissory representation as to the non-removal of the note had been available, and had the question been submitted to the jury, the charge would have been well enough. But that question was not before them. The questions submitted to them related exclusively to the representations that the eighty per cent. should not be required to be paid. That was the fraud before the jury; and the question involved in the 7th and 12th requests was this: assuming that representation to be a fraud which would avoid the contract, had the defendant discharged his duty in discovering that fraud, and repudiating the contract on account of that fraud, and not on account of another fraud not now in question? We think the plaintiff was entitled to the opinion of the jury on that precise question. The charge refused him this right. The jury were charged, that if, within a few months after receiving the certificate, the defendant discovering that he had been deceived in some respects, sent an agent to Chicago to surrender his certificate and demand his note, if he never afterwards acquiesced in being a member of the Company, if he brought an action of replevin for the note, and if he refused to receive a dividend, this was sufficient evidence of repudiation. This was well enough as to the abandoned fraud which was not before the jury, but was entirely inapplicable to the fraud that was before them. As to that fraud, the defendant testified that he had no knowledge or suspicion of its existence until after the demand made upon him in 1873 by the assignee, and that he never made any investigation as to the truth of the representation as to the eighty per cent. liability until after said demand in 1873. On this point there was no contradictory evidence. It should have been ruled as a question of law. *Pettibone v. Stevens*, 15 Conn., 19; *Beers v. Botsford*, 13 Conn., 146. The submission should have been made, if not ruled as a question of law, on these facts only, as requested; and the failure to do so, and the introduction of the facts tending to show a repudiation on the ground of another fraud, could not fail to confuse the jury, and was error on the part of the judge.

Wright's case, L. R., 12 Eq., 1871, p. 381-351, is an authority on this point. It was there held, first, that, under the English Act, a surrender and cancellation of shares did not relieve the holder from his liability to creditors of the bank; and, second, that a surrender by Wright of his shares in November, on the ground of an apprehended difficulty in the affairs of the bank, did not enable him to claim a rescission of his subscription on account of a fraudulent representation in the prospectus of the Company, which fraud was then unknown to him. *Henderson v. Bk.*, 7 El. & Bl., 856; *Powis v. Hard-See 1 Otto*

ing, 1 C. B. (N. S.), 583; *Oakes v. Turquand*, L. R. 2 Eng. & Ir. Ap. Cas., 325.

The principle laid down in the charge of the judge, that one who claims to have been drawn into a fraudulent purchase must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud, is a sound one. *Thomas v. Bartow*, 48 N. Y., 193.

The defendant sought to become a member of a Corporation of the State of Illinois, and to obtain the benefits and advantages of its special privileges. If he is not held to be bound to know and accept all the consequences of this connection, he certainly is bound to use care and attention to ascertain his position, and promptly to make his choice of retaining it with its advantages and responsibilities, or of abandoning it. To subscribe for stock in a corporation in August, 1870, to rest quietly until the year 1873, never making any investigation as to the position in which he stood until that time, and until after the assignee in bankruptcy had made a demand upon him, falls very far short of what the law requires. Especially is this the case when it is shown that he lived in an adjoining State; that he sent an agent to Chicago, and himself went to that city in 1871 to obtain his note and mortgage from that very Company for an alleged misconduct in another respect. It was his plain duty to have inquired and to have ascertained his position long before he did. "A party must use reasonable diligence to ascertain the facts." *Buford v. Brown*, 6 B. Mon., 558.

Mere lapse of time, where a party has not asserted his claim with reasonable diligence, is a bar to relief. Relief is not given to those who sleep on their rights. *Beckford v. Wade*, 17 Ves., 87-97; *Jones v. Tuberville*, 2 Ves., Jr., 11.

Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person. *Duke of Beaufort v. Neeld*, 12 Cl. & F., 248-286.

Parties who are shareholders, and claim to be relieved on the ground of fraud, must act with the utmost diligence and promptitude. *Smith's case*, L. R., 2 Ch. Ap., 618; *Denton v. MacNeil*, L. R., 2 Eq., 352; *Peel's case*, L. R., 2 Ch. Ap., 684.

The judgment must be reversed and a new trial had.

Mr. Justice Miller, dissenting:

I am of opinion, that, where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defense to a suit for the unpaid installments, when suit is brought by the corporation; and that if the stockholder has in reasonable time repudiated the contract, and offered to rescind before the insolvency or bankruptcy of the corporation, the defense is valid against the assignee of the corporation.

I also think there was evidence of such fraud in this case, and that the question of reasonable diligence in the offer to rescind was fairly put to the jury by the circuit court.

I am authorized to say that the *Chief Justice*

and *Mr. Justice Bradley* concur in what I have here said.

Cited—91 U. S., 64; 95 U. S., 667; 96 U. S., 330; 102 U. S., 316; 103 U. S., 509; 105 U. S., 149; 5 Sawy., 93; 7 Sawy., 31, 32; 4 Cliff., 547, 549; 4 Dill., 232; 5 Dill., 374; 1 Hughes, 161; 16 Bk. Reg., 538; 17 Bk. Reg., 490; 18 Bk. Reg., 466; 16 Blatchf., 560, 561; 17 Blatchf., 260; 82 N. Y., 541; 87 N. Y., 299; 83 Ohio St., 113, 293; 84 Ohio St., 63; 97 Ill., 549, 550; 37 Am. Rep., 136; 47 Wis., 620; 32 Am. Rep., 791.

UNITED STATES, *Appt.*,

v.

THE STEAMSHIP JUNIATA, THE PHILADELPHIA AND SOUTHERN MAIL STEAMSHIP COMPANY, Claimant.

THE STEAMSHIP JUNIATA, THE PHILADELPHIA AND SOUTHERN MAIL STEAMSHIP COMPANY, Claimant, *Appt.*,

v.

UNITED STATES.

(See S. C., "*The Juniata*," 1 Otto, 366, 367.)

Depositions, when inadmissible.

Depositions taken since the appeal from the Circuit Court, under a commission issued from the Circuit Court, cannot be admitted in this court, when further proof in the case has not been ordered by this court, unless a sufficient excuse was shown for not taking the evidence in the usual way before the courts below.

[Nos. 328, 329.]

Motion made Oct. 29, 1875. Decided Nov. 1, 1875.

CROSS APPEALS from the Circuit Court of the United States for the District of Louisiana.

Mr. T. J. Durant, for the Philadelphia and Southern Mail Steamship Company:

In these cases, Nos. 328 and 329, *Mr. Thos. J. Durant* submitted the motion, Oct. 15, to have the return to the commission issued by the Circuit Court to take depositions of certain witnesses, filed and printed as part of the record.

Oct. 28, the following order was entered:

"On consideration of the motion of *Mr. T. J. Durant*, it is now here ordered that he have leave to file and have printed the return to the commission issued by the Circuit Court in these cases, but not to be made part of the record."

On Oct. 29, *Mr. Durant* submitted a motion to have the deposition of *Daniel C. Holliday* made part of the record. Nov. 1, this motion was denied, with leave to renew on proper showing.

Mr. Chief Justice Waite delivered the opinion of the court:

The motion in these cases to make the depositions taken since the appeal, a part of the record, is denied. They were taken under a commission issued from the Circuit Court. Further proof in the case has not been ordered by this court. No such order would have been granted if application therefor had been made, unless a sufficient excuse was shown for not taking the evidence in the usual way before the courts below. This was the rule established in the case of *The Mabey*, 10 Wall., 419 [77 U. S., XIX., 968]. We cannot admit depositions taken un-

der a commission from the Circuit Court, except upon a similar showing. That has not been made. *Leave is granted to renew the motion if this defect can be supplied.*

THE NATIONAL BANK OF COMMERCE OF BOSTON, MASSACHUSETTS, *Ply.* in *Err.*,

v.

THE MERCHANTS' NATIONAL BANK OF MEMPHIS, TENNESSEE.

(See S. C., 1 Otto, 92-105.)

Bill of lading, when acceptor of draft entitled to—agent's duty.

1. When a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection, with the bill of lading attached, without any further instructions, the agent should deliver over the bill of lading to the drawee on the acceptance of the draft. It is not the agent's duty, after the acceptance, to hold the bill of lading for the payment of the draft.

2. Such agent can be held liable to the owners of the drafts, for a breach of duty in surrendering the bills of lading on acceptance of the drafts, only after special instructions to retain the bills until payment of the acceptances.

[No. 15.]

Argued Jan. 21, 22, 1875. Decided Nov. 1, 1875.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The Merchants' National Bank of Memphis, the original plaintiff in this case, in June, 1870, discounted for *James H. Mulford*, two drafts drawn by him on *Green & Travis*, of Boston, payable in thirty days from date to the order of said *Mulford*, and by him indorsed. Said drafts upon their face purported to be drawn against a specified number of bales of cotton, and to have the bills of lading attached; and in fact bills of lading, or railroad receipts for the cotton made to the order of said *Mulford* and by him indorsed in blank, were attached to the drafts and delivered with them to the Bank.

In the same month of June, 1870, said Bank discounted for one *S. M. Anderson* a sight draft drawn by him on *Green & Travis*, payable to said *Anderson's* order, and by him indorsed; to which draft was attached at the time of discount, a bill of lading for 108 bales of cotton, shipped by him to *Green & Travis* indorsed in blank by said *Anderson*.

The drafts, with bills of lading attached were forwarded by the Bank of Memphis for collection to the Metropolitan Bank, its correspondent in New York, and by that Bank was transmitted to the Bank of Commerce, the original defendant, its correspondent in Boston, by letters which inclosed also other drafts, all of which were stated to be sent for collection.

The Bank of Commerce presented the several drafts as they were received; and upon their acceptance by *Green & Travis*, detached and surrendered to them the several bills of lading; and they thereupon procured and sold the cotton upon said two first named bills of lading, and transferred the third bill of lading to a *bona fide* purchaser in pledge for \$10,000, which sum the Bank of Memphis paid to redeem the same.

June 29, the day when the sight draft was accepted and the bill of lading attached thereto was surrendered, Green & Travis failed, and have since gone into bankruptcy without assets, so that said thirty days' drafts remain wholly unpaid to the Bank of Memphis.

There was an agreement by Green & Travis with Mulford and with Anderson, that the bills of lading should be delivered upon their acceptance of the drafts, but such agreement was not known to the Bank of Memphis.

This action was brought against the plaintiff in error for alleged negligence in surrendering the three railroad receipts or bills of lading attached to the three drafts.

The case was tried before a jury, and a verdict rendered for the plaintiff in the court below.

The plaintiff in error submitted that the court below erred, among other things, in not giving the instruction asked for at the close of the plaintiff's case: "That it was the duty of the defendants to surrender the bills of lading upon the acceptance of the drafts, and that they were not bound to hold the same for payment."

And further; in the following instruction to the jury: "But if the Metropolitan Bank merely sent to the defendant Bank the bills of exchange, with the bills of lading attached, for collection, with no other instructions, either express or implied from the past relations of the parties, they would not be so justified in surrendering on acceptance only."

Messrs. Henry W. Paine, B. F. Thomas and Henry Hutchins, for plaintiff in error:

Conceding that railroad receipts are to be held to be negotiable, like bills of lading, and their indorsement and delivery pass the title to the property mentioned in them, it is submitted that, in the absence of any instructions, the plaintiff in error was warranted in its inference that the bills of lading were annexed to the drafts to secure their acceptance, and were to be surrendered on acceptance and, therefore, it is not liable to an action for such surrender.

Lanfear v. Blossman, 1 La. Ann., 148; *Country v. Gladstone*, 4 L. R. Eq. Cas., 498; *Gurney v. Bekrend*, 3 Ellis & Bl., 622; *Shepherd v. Harrison*, L. R. 4 Q. B., 196; *S. C.*, 5 L. R. H. L. Cas., 116; *Schuchardt v. Hall*, 36 Md., 590; *Bryans v. Niz*, 4 M. & W., 775; *Bk. v. Wright*, 48 N. Y., 1; *Wisconsin Bank v. Bk. of Brit. N. America*, 21 U. C. Q. B., 284; *S. C.*, 2 U. C. Error and Appeal Rep., 282; *Clark v. Bk.*, 18 Grant's Ch. (U. C.), 211; *Goodenough v. Bk.*, 10 U. C., Com. Pl., 51.

Messrs. W. G. Russell, Samuel Dickson and Jas. O. Bullitt, for defendant in error:

By retaining the bills of lading and indorsing and delivering them to the Bank of Memphis, the shippers of the cotton reserved to themselves, and transferred to the Bank the entire *jus disponendi* as well as the legal title of the cotton, and no title passed to the proposed consignee, Green & Travis.

Hamp. Sales, 2d ed., 288, *at seq.*; *Wait v. Baker*, 2 Exch., 1; *Jenkyns v. Brown*, 14 Q. B., 496; *Ellenbach v. Magniac*, 6 Exch., 570; *Turner v. Liverpool Dock*, 6 Exch., 543; *Shepherd v. Harrison*, L. R. 5 H. L. Cas., 116; *Gilbert v. Guignon*, L. R. 8 Ch., 16; *The Marie Joseph*, L. R. 1 P. C., 248; *Henderson v. Comptoir d'Escompte de Paris*, L. R. 5 P. C., 258; *Bk. of India*

v. Henderson, L. R., 5 P. C., 501; *Conard v. Ins. Co.*, 1 Pet., 386; *Walter v. Ross*, 2 Wash. C. C., 283; *The Thames*, 14 Wall., 98 (81 U.S., XX., 804); *Bk. v. Rome, W., etc., R. R. Co.*, 44 N. Y., 136; *Bk. v. Daniels*, 47 N. Y., 631; *Bk. v. Wright*, 48 N. Y., 1; *Seymour v. Newton*, 105 Mass., 272; *Bk. v. Crocker*, 111 Mass., 163; *Bk. v. Dearborn*, 115 Mass., 219; *Bk. v. Bayley*, 115 Mass., 228; *Newcomb v. R. R. Co.*, 115 Mass., 230; *Alderman v. R. R. Co.*, 115 Mass., 233; *Ld. Westbury in Shepherd v. Harrison*, L. R., 5 H. L. Cas., 116, 129.

The case, therefore, presents itself in its simplest form, presented in the authorities above cited, viz.: that of a shipment of goods by the owner, who at most has made an executory contract for their sale to the consignee. It is well settled that in such case the vendor, by retaining or transferring the bill of lading, retains or transfers the absolute title of *jus disponendi* of the goods; he may alter entirely their destination; may divest the proposed purchaser of all possible future or contingent title; and in fact may, so far as title is concerned, deal with the goods as he pleases, with anyone who takes them *bona fide* and for value.

This doctrine lies at the foundation of and is supported by all the authorities above cited.

See, *Bk. v. Daniels*, 47 N. Y., 633.

Besides *Lanfear v. Blossman*, 1 La. Ann., 148, it is believed no case can be found which declares that the holder of a bill of lading attached to a draft drawn for the purchase money of the goods is bound to surrender the bill of lading to the purchaser upon his acceptance of the draft.

The later authorities in England and in this country hold in terms, or decide by direct and necessary implication, that the holder of a draft discounted *bona fide* for value, with bill of lading attached, holds it as security for payment, and not for acceptance merely.

Directly in point are: *Gilbert v. Guignon*, 8 L. R. Ch. 16 (1872); *Seymour v. Newton*, 105 Mass., 272; *Newcomb v. R. R. Co.*, 115 Mass., 230; *Stollenwerck v. Thacher*, 115 Mass., 224.

Mr. Justice Strong delivered the opinion of the court:

The fundamental question in this case is, whether a bill of lading of merchandise deliverable to order, when attached to a time draft and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawee on his acceptance of the draft, or whether the agent's duty is to hold the bill of lading after the acceptance for the payment. It is true, there are other questions growing out of portions of the evidence, as well as one of the findings of the jury; but they are questions of secondary importance. The bills of exchange were drawn by cotton-brokers residing in Memphis, Tennessee, on Green & Travis, merchants, residing in Boston. They were drawn on account of cotton shipped by the brokers to Boston, invoices of which were sent to Green & Travis; and bills of lading were taken by the shippers, marked in case of two of the shipments "To order," and in case of the third shipment marked "For Green & Travis, Boston, Mass." There was an agreement between the shippers and the drawees that the bill of lading should be surrendered on ac-

ceptance of the bills of exchange; but the existence of this agreement was not known by the Bank of Memphis when that Bank discounted the drafts, and took with them the bills of lading indorsed by the shippers. We do not propose to inquire now whether the agreement, under these circumstances, ought to have any effect upon the decision of the case. Conceding that bills of lading are negotiable, and that their indorsement and delivery pass the title of the shippers to the property specified in them and, therefore, that the plaintiffs, when they discounted the drafts and took the indorsed railroad receipts or bills of lading, become the owners of the cotton, it is still true that they sent the bills with the drafts to their correspondents in New York, the Metropolitan Bank, with no instructions to hold them after acceptance; and the Metropolitan Bank transmitted them to the defendants in Boston, with no other instructions than that the bills were sent "for collection." What then was the duty of the defendants? Obviously, it was first to obtain the acceptance of the bills of exchange. But Green & Travis were not bound to accept, even though they had ordered the cotton, unless the bills of lading were delivered to them contemporaneously with their acceptance. Their agreement with their vendors, the shippers, secured them against such an obligation. Moreover, independent of this agreement, the drafts upon their face showed that they had been drawn upon the cotton covered by the bills of lading. Both the plaintiffs and their agents, the defendants, were thus informed that the bills were not drawn upon any funds of the drawers in the hands of Green & Travis, and that they were expected to be paid out of the proceeds of the cotton. But how could they be paid out of the proceeds of the cotton if the bills of lading were withheld? Withholding them, therefore, would defeat alike the expectation and the intent of the drawers of the bills. Hence, were there nothing more, it would seem that a drawer's agent to collect a time bill, without further instructions, would not be justified in refusing to surrender the property against which the bill was drawn, after its acceptance, and thus disable the acceptor from making payment out of the property designated for that purpose.

But it seems to be a natural inference, indeed a necessary implication, from a time draft accompanied by a bill of lading indorsed in blank, that the merchandise (which in this case was cotton) specified in the bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. It is difficult to conceive of any other meaning the instruments can have. If so, in the absence of any express arrangement to the contrary, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill, and thus giving the vendor a completed contract for payment. This would not be doubted, if, instead of an acceptance, he had given a promissory note for the goods, payable at the expiration of the stipulated credit. In such a case, it is clear that the vendor could not retain possession of the subject of the sale after receiving the note for the price. The idea of a sale on credit, is that the vendee is to have

the things sold on his assumption to pay, and before actual payment. The consideration of the sale is the note. But an acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he has purchased on credit, and is denied possession until he shall make payment, the transaction ceases to be what it was intended, and is converted into a cash sale. Everybody understands that a sale on credit entitles the purchaser to immediate possession of the property sold, unless there be a special agreement that it may be retained by the vendor; and such is the well recognized doctrine of the law. The reason for this is, that very often and with merchants generally the thing purchased is needed to provide means for the deferred payment of the price. Hence it is justly inferred that the thing is intended to pass at once within the control of the purchaser. It is admitted that a different arrangement may be stipulated for. Even in a credit sale, it may be agreed by the parties that the vendor shall retain the subject until the expiration of the credit, as a security for the payment of the sum stipulated. But, if so, the agreement is special, something superadded to an ordinary contract of sale on credit, the existence of which is not to be presumed. Therefore, in a case where the drawing of a time draft against a consignment raises the implication that the goods consigned have been sold on credit, the agent to whom the draft to be accepted and the bill of lading to be delivered have been intrusted cannot reasonably be required to know, without instructions, that the transaction is not what it purports to be. He has no right to assume and act on the assumption that the vendee's term of credit must expire before he can have the goods, and that he is bound to accept the draft, thus making himself absolutely responsible for the sum named therein, and relying upon the vendor's engagement to deliver at a future time. This would be treating a sale on credit as a mere executory contract to sell at a subsequent date.

If the inference to be drawn from a time draft accompanied by a bill of lading is, not that it evidences a credit sale but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is, that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. The drawee is not asked to accept on the mere assurance that the drawer will, at a future day, deliver the goods to re-imburse the advances; he is asked to accept in reliance on a security in hand. To refuse to him that security is to deny him the basis of his requested acceptance: it is remitting him to the personal credit of the drawer alone. An agent for collection having the draft and attached bill of lading cannot be permitted, by declining to surrender the bill of lading on the acceptance of the bill, to disappoint the obvious intentions of the parties, and deny to the acceptor a substantial right which by his contract is assured to him. The same remarks are applicable to the case of an implication that the merchandise was shipped to be sold on account of the shipper.

Nor can it make any difference that the draft with the bill of lading has been sent to an agent (as in this case) "for collection." That instruc-

tion means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency. *Sweeney v. Easter*, 1 Wall., 166 [68 U. S., XVII., 681]. It does not conflict with the plain inference from the draft and accompanying bill of lading that the former was a request for a promise to pay at a future time for goods sold on credit, or a request to make advances on the faith of the described consignment, or a request to sell on account of the shipper. By such a transmission to the agent, he is instructed to collect the money mentioned in the drafts, not to collect the bill of lading; and the first step in the collection is procuring acceptance of the draft. The agent is, therefore, authorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property or of the bill of lading, it is the duty of the agent to make that surrender; and if he fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and indorsers of the draft are discharged. *Mason v. Hunt*, 1 Doug., 297.

The opinions we have suggested are supported by other very rational considerations. In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise? Or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much, after shipment, under the control of the drawer, as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? (The shipments in this case were hundreds of bales of cotton). Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no ability to sell till the draft is due? If the consignment be of perishable articles—such as peaches, fish, butter, eggs, etc.—are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold.

That the holder of a bill of lading, who has become such by indorsement and by discounting the draft drawn against the consigned property, succeeds to the situation of the shipper, is not to be doubted. He has the same right to demand acceptance of the accompanying bill, and no more. If the shipper cannot require

acceptance of the draft without surrendering the bill of lading, neither can the holder. Bills of lading, though transferable by indorsement, are only *quasi* negotiable. 1 Pars. Ship., 192; *Blanchard v. Page*, 8 Gray, 297. The indorser does not acquire a right to change the agreement between the shipper and his vendee. He cannot impose obligations or deny advantages to the drawee of the bill of exchange drawn against the shipment which were not in the power of the drawer and consignor. But, were this not so in the case we have now in hand, the agents for collection of the drafts were not informed, either by the drafts themselves or by any instructions they received, or in any other way, that the ownership of the drafts and bills of lading was not still in the consignors of the cotton. On the contrary, as the drafts were sent "for collection," they might well conclude that the collection was to be made for the drawers of the bills. We do not, therefore, perceive any force in the argument pressed upon us, that the Bank of Memphis was the purchaser of the drafts drawn upon Green & Travis, and the holder of the bills of lading by indorsement of the shippers.

It is urged that the bills of lading were contracts collateral to the bills of exchange which the Bank discounted and that, when transferred, they became a security for the principal obligation, namely: the contract evidenced by the bills of exchange—for the whole contract, and not a part of it; and that the whole contract required not only the acceptance, but the payment of the bills. The argument assumes the very thing to be proved, to wit: that the transfer of the bills of lading were made to secure the payment of the drafts. The opposite of this, as we have seen, is to be inferred from the bills of lading and the time drafts drawn against the consignments, unexplained by express stipulations. The Bank, when discounting the drafts, was bound to know that the drawers on their acceptance were entitled to the cotton and, of course, to the evidences of title to it. If so, they knew that the bills of lading could not be a security for the ultimate payment of the drafts. Payment of the drafts by the drawees was no part of the contract when the discounts were made. The bills of exchange were then incomplete. They needed acceptance. They were discounted in the expectation that they would be accepted, and that thus the Bank would obtain additional promisors. The whole purpose of the transfers of the bills of lading to the Bank may, therefore, well have been satisfied when the additional names were secured by acceptance, and when the drafts thereby became completed bills of exchange. We have already seen that, whether the drafts and accompanying bills of lading evidenced sales on credit, or requests for advancements on the cotton consigned, or bailments to be sold on the consignor's account, the drawees were entitled to the possession of the cotton before they could be required to accept; and that, if they had declined to accept because possession was denied to them concurrently with their acceptance, the effect would have been to discharge the drawers and indorsers of the drafts. The demand of acceptance, coupled with a claim to retain the bills of lading, would have been an insufficient demand. Surely the purpose of putting the bills of lading into the

hands of the Bank was to secure the completion of the drafts by obtaining additional names upon them, and not to discharge the drawers and indorsers, leaving the Bank only a resort to the cotton pledged.

It is said, that, if the plaintiffs were not entitled to retain the bills of lading as a security for the payment of the drafts after their acceptance, their only security for payment was the undertaking of the drawees, who were without means, and the promise of the acceptors, of whose standing and credit they knew nothing. This may be true; though they did know that the acceptors had previously promptly met their acceptances, which were numerous and large in amount. But, if they did not choose to rely solely on the responsibility of the acceptors and drawers, they had it in their power to instruct their agents not to deliver the cotton until the drafts were paid. Such instructions are not infrequently given in case of time-drafts against consignments; and the fact that they are given tends to show that in the commercial community it is understood, that, without them, agents for collection would be obliged to give over the bills of lading on acceptance of the draft. Such instructions would be wholly unnecessary, if it is the duty of such agents to hold the bills of lading as securities for the ultimate payment.

Thus far, we have considered the question without reference to any other authority than that of reason. In addition to this, we think the decisions of the courts and the language of many eminent judges accord with the opinions we avow. In the case of *Lanfear v. Blossman*, 1 La. Ann., 148, the very point was decided, after an elaborate argument both by the counsel and by the court. It was held that "Where a bill of exchange drawn on a shipment, and payable a certain number of days after sight, is sold, with the bill of lading appended to it, the holder of the bill of exchange cannot, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the bill of exchange, except on the delivery of the bill of lading; and when, in consequence of the refusal of the holder to deliver the bill of lading, acceptance is refused, and the bill protested, the protest will be considered as made without cause, the drawee not having been in default, and the drawer will be discharged." This decision is not to be distinguished in its essential features from the opinions we have expressed. A judgment in the same case to the same effect was given in the Commercial Court of New Orleans by Judge Watts, who supported it by a very convincing opinion. 14 Hunt's Merchants' Magazine, 264. These decisions were made in 1845 and 1846. In other courts, also, the question has arisen: what is the duty of a collecting bank to which time drafts, with bills of lading attached, have been sent for collection? and the decisions have been, that the agent is bound to deliver the bills of lading to the acceptor on his acceptance. In the case *Wis. M. & F. Ins. Co. v. Bk. of British N. Am.*, 21 Up. Can. (Q. B.), 284, decided in 1861, where it appeared that the plaintiff, a bank at Milwaukee, Wis., had sent to the defendants, a bank at Toronto, for collection, a bill drawn by A. at Milwaukee on B. at Toronto, payable forty-five days after date,

together with a bill of lading, indorsed by A., for certain wheat sent from Milwaukee to Toronto, it was held, that, in the absence of any instructions to the contrary, the defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. This case was reviewed in 1863 in the Court of Error and Appeals, and the judgment affirmed. *S. C.*, 2 Up. Can. Er. and Ap. 282; see, also, *Goodenough v. Bk.*, 10 Up. Can., C. P., 51; *Clark v. Bk. of Montreal*, 13 Grant, Ch., 211.

There are also many expressions of opinion by the most respectable courts, which, though not judgments and, therefore, not authorities, are of weight in determining what are the implications of such a state of facts as this case exhibits. In *Shepherd v. Harrison*, L. R. 4 Q. B., p. 493, Lord Cockburn said, "The authorities are equally good to show, when the consignor sends the bill of lading to an agent in this country to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee," that that "indicates an intention that the handing over of the bill of lading, and the acceptance of the bill or bills of exchange, should be concurrent parts of one and the same transaction." The case subsequently went to the House of Lords, 5 H. L. [L. R., 5 Eng. & Ir. App.], 138; when Lord Cairns said, "If they (the drawees) accept the cargo and bill of lading, and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount, or use it as they think proper; and they are virtually paid for the goods." In *Corentry v. Gladstone*, 4 L. R. Eq., 493, it was declared by the Vice-Chancellor that "The parties shipping the goods from Calcutta, in the absence of any stipulation to the contrary, did give their agents in England full authority, if they thought fit, to pass over the bill of lading to the person who had accepted the bill of exchange" drawn against the goods, and attached to the bill of lading; and it was ruled that an alleged custom of trade to retain the bill of lading until payment of the accompanying draft on account of the consignment was exceptional, and was not established as being the usual course of business. In *Schuchardt v. Hall*, 38 Md., 590, which was a case of a time draft, accompanied by a bill of lading, hypothecated by the drawer, both for the acceptance and payment of the draft, and when the drawers had been authorized to draw against the cargo shipped, it was said by the court, "Under their contract with the defendants, the latter were authorized to draw only against the cargo of wheat to be shipped by the 'Ocean Belle'; and they (the drawees) were, therefore, not bound to accept without the delivery to them of the bill of lading." See, also, the language of the judges in *Gurney v. Behrend*, 3 Ell. & Bl., 622; *Bk. v. Wright*, 48 N. Y., 1; *Bk. v. Daniels*, 47 N. Y., 631.

We have been unable to discover a single decision of any court holding the opposite doctrines. Those to which we have been referred as directly in point determine nothing of the kind. *Gilbert v. Guignon*, L. R., 8 Ch., 16, was a contest between two holders of several bills of lading of the same shipment. The

question was: which had priority? It was not all whether the drawee of a time draft against a consignment has not a right to the bill of lading when he accepts. The drawer had accepted without requiring the surrender of the first indorsed bill of lading; and the Lord Chancellor, while suggesting a query whether he might not have declined to accept unless the bills of lading were at the same time delivered up to him, remarked, "If he was content they should remain in the hands of the holder, it was exactly the same thing as if he had previously and originally authorized that course of proceeding; and that (according to the Chancellor's view) was actually what had happened in the case." Nothing, therefore, was decided respecting the rights of the holder of a time draft, to which a bill of lading is attached, as against the drawee. The contest was wholly *inter alios*.

Seymour v. Newton, 105 Mass., 272, was the case of an acceptance of the draft, without the presentation of the bill of lading. In that respect, it was like *Gilbert v. Guignon*. No question, however, was made in regard to this. The acceptor became insolvent before the arrival of the goods; and all that was decided was, that, under the circumstances, the jury would be authorized to find that the lien of the shippers had not been discharged. It was a case of stoppage *in transitu*. It is true, that, in delivering the opinion of the court, *Chief Justice* Chapman said: "The obvious purpose was, that there should be no delivery to the vendee till the draft should be paid." But the remark was purely *obiter*, uncalled for by anything in the case. *Newcomb v. R. R. Corp.*, 115 Mass., 280, was also the case of acceptance of sight drafts, without requiring the delivery of the attached bills of lading; and the contest was not between the holder of the drafts and the acceptor; it was between the holder of the drafts with the bills of lading and the carrier. We do not perceive that the case has any applicability to the question we have now under consideration. True, there, as in the case of *Seymour v. Newton*, it was remarked by the judge who delivered the opinion: "The railroad receipts were manifestly intended to be held by the collecting Bank as security for the acceptance and payment of the drafts." Intended by whom? Evidently the court meant by the drawees and the Bank; for it is immediately added: "They continued to be held by the Bank after the drafts had been accepted by Chandler & Co. (the drawees), and until at Chandler & Co.'s request they were paid by the plaintiff; and the receipts, with the drafts still attached, were indorsed and delivered by Chandler & Co. to the plaintiff." In *Stollenwerk v. Thacher*, 115 Mass., 224 (the only other case cited by the defendants in error as in point on this question), there were instructions to the agent to deliver the bill of lading only on payment of the draft; and it was held that the special agent, thus instructed, could not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case. In *Bk. v. Bayley*, reported in the same volume, p. 228, where the instructions given to the collecting agent were, so far as it appears, only that the drafts and bills of lading were remitted for collection, and where acceptance

was refused, *Chief Justice* Gray said: "The drawees of the draft attached to each of the bills of lading were not entitled to the bill of lading, or the property described therein, except upon acceptance of the draft." It is but just to say, however, that this remark, as well as those made by the same judge in the other Massachusetts cases cited, was aside from the decision of the court.

After this review of the authorities cited, as in point, in the very elaborate argument for the defendants in error, we feel justified in saying, that, in our opinion, no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft.

If this, however, were doubtful, the doubt ought to be resolved favorably to the agent. In the case in hand, the Bank of Commerce, having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties. *Warren Bk. v. Suffolk Bk.*, 10 Cush., 582. In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done further than to procure acceptances of the drafts, and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent.

Applying what we have said, to the instruction given by the learned judge of the Circuit Court to the jury, it is evident that he was in error. Without discussing in detail the several assignments of error, it is sufficient for the necessities of this case to say that it was a mistake to charge the jury, as they were charged, that "In the absence of any consent of the owner of a bill of exchange, other than such as may be implied from the mere fact of sending 'for collection' a bill of exchange with a bill of lading pasted or attached to a bill of exchange, the bank so receiving the two papers for collection would not be authorized to separate the bill of lading from the bill of exchange, and surrender it before the bill of exchange was paid." And again; there was error in the following portion of the charge: "But if the Metropolitan Bank merely sent to the defendant Bank the bills of exchange with the bills of lading attached for collection, with no other instructions, either expressed or implied from the past relations of the parties, they would not be so justified in surrendering (the bills of lading) on acceptance only." The Bank of Commerce can be held liable to the owners of the drafts for a breach of duty in surrendering the bills of lading on acceptance of the drafts, only after special instructions to retain the bills until payment of the acceptances. The drafts were all time drafts. One, it is true, was drawn at sight; but, in Massachusetts, such drafts are entitled to grace.

What we have said renders it unnecessary to notice the other assignments of error.

The judgment of the Circuit Court is reversed.

and the record is remitted, with directions to award a new trial.

Cited—74 N. Y., 591.

THE STEAMBOAT ELIZA HANCOX, ETC.,
LOCKWOOD W. BURNS, Claimant, Appt.,

v.

CHARLES S. LANGDON.

Case affirmed on the facts.

In cases in admiralty in which appeals are taken to this court upon questions of fact, where there have been two concurring opinions in the courts below, this court, if not satisfied that some finding of the courts below was wrong, will affirm the judgment.

[No. 86.]

Argued Nov. 9, 10, 1875. Decided Nov. 15, 1875.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The libel in this case was filed by the appellee, in the District Court of the United States for the Southern District of Georgia, against the steamboat Eliza Hancox, in a cause of collision. The collision took place Feb. 3 or 4, 1871, about midnight, in the Darien River, Georgia, near the mouth of Catfish Creek. In the collision the libellant's boat, The O. F. Potter, was sunk. The theory of the libellant was that The Potter blew two whistles, was answered by two and bore to the left ascending; that The Hancox did not obey the signals, but bore down full upon The Potter and sank her. The theory of the claimant was, that The Potter blew one whistle, which The Hancox answered with one; that The Hancox bore to the right; that The Potter sheered to the left, ran across the bow of The Hancox and was sunk. The original answer of the claimant did not deny that The Potter was a total loss. The district court rendered a judgment in favor of the libellant for \$10,000, and the claimant appealed to the circuit court. Additional testimony was taken in that court, and the decree of the district court affirmed, with costs. In the circuit court an amendment to the answer was filed, denying that The Potter was a total loss. Counsel for the libellant consented to the filing of this amendment, denying its relevancy and reserving the right to demur. The courts below assessed the damages upon the theory of a total loss. There was much conflict in the testimony, both as to the cause of the collision, and upon the question of damages. The claimant appealed to this court from the decree of the circuit court, and additional testimony was taken here.

Messrs. E. C. Benedict and Robert Faligant, for appellant:

Messrs Rufus E. Lester and William U. Garrard, for appellee:

Mr. Chief Justice Waite delivered the opinion of the court:

This is one of a class of cases in admiralty in which appeals are taken to this court upon questions of fact, when there have been two concurring opinions in the courts below. We think the finding in the court below, as to the culpable fault of The Hancox, was clearly right, and

are not satisfied that, as to the damages, it was wrong.

The decree of the Circuit Court is affirmed.

DAVID DOWS, JOHN DOWS MAIRS AND
ALEXANDER ECTOR ORR, *Plfs.* in
Err.,

v.

THE NATIONAL EXCHANGE BANK OF
MILWAUKEE.

(See S. C., 1 Otto, 618-637).

Invoice, effect of—bill of lading, delivery of—when transfers property in the goods—power of agents—accepting goods—jury question—purchaser from agent.

1. The transmission of the invoices of goods does not pass the property in goods without the acceptance and payment of the drafts drawn against them. An invoice is not a bill of sale, nor is it evidence of a sale.

2. A bill of lading taken deliverable to the shipper's own order, is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased.

3. Drafts against wheat having been discounted by a bank, and the bills of lading handed over with the drafts as security, the bank became owner of the goods until payment of the drafts.

4. Special agents of the owner had no power to make such a delivery as would divest the ownership of their principals.

5. By the act of accepting goods in bailment, the bailee acknowledges a right or title in the bailor.

6. Where there is any evidence to rebut the effect of the bill, it becomes a question for the jury, whether the property has passed. But where there is no such evidence, there is no necessity of submitting to the jury the question as to whether there was a change of ownership.

7. Express direction by the bank to its agent, to hold the property for the payment of the drafts, and to deliver it only on payment, removed the possibility of any presumed intent to deliver it while the drafts remained unpaid.

8. Where a purchaser from such agent received the property and converted it to his use, the bank can recover its value of him. He could acquire no title or even lien from a tortious possessor.

[No. 8.]

Argued Apr. 7, 8, 1875. Decided Nov. 15, 1875.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This was an action of trover instituted in the court below by the National Exchange Bank of Milwaukee, against the plaintiffs in error, to recover damages for the alleged conversion by them of 22,341 bushels of wheat. The plaintiffs in error, defendants below, were a New York firm doing business under the firm name of David Dows & Co.

W. P. McLaren & Co., of Milwaukee, Wisconsin, under an order to purchase wheat given by A. F. Smith & Co., of Oswego, New York, purchased at Milwaukee three cargoes of wheat, which were shipped at that port in the vessels called The Kate Kelly, The Grenada and The Corsican. McLaren & Co. paid for the wheat themselves, and procured from the plaintiffs below a discount of drafts drawn by them upon A. F. Smith & Co., to cover the amount of the purchase money and charges.

McLaren & Co. transmitted to A. F. Smith & Co. invoices showing the purchase of the wheat for each cargo bought for account and

by order of A. F. Smith & Co., Oswego, New York, through W. P. McLaren & Co., charging A. F. Smith & Co. with costs of wheat and various charges for inspection, insurance, interest, etc., and giving credit for the net proceeds of the drafts.

The drafts, discounted by the plaintiffs, were as follows:

Kate Kelly, 14,254½ bushels No. 1 wheat.	
Sight draft, dated Sep. 2, 1869,.....	\$4,080.81
Time draft at 80 days, dated Sep. 2,	
1869.....	7,500.00
Time draft at 45 days, dated Sep. 2,	
1869.....	7,500.00
Grenada, 14,500 No. 1 wheat.	
Sight draft, dated Sep. 18, 1869.....	\$1,232.24
Time draft at 80 days, dated Sep. 18,	
1869.....	8,000.00
Time draft at 45 days, dated Sep. 18,	
1869.....	8,000.00
Corsican, 13,400 bushels No. 1 wheat.	
Sight draft, dated Sep. 27, 1869.....	\$3,423.98
Time draft at 80 days, dated Sep. 27,	
1869.....	6,600.00
Time draft at 40 days, dated Sep. 27,	
1869.....	6,600.00

The bills of lading given by the masters of the respective vessels were delivered by McLaren & Co. to the plaintiffs. These bills described William P. McLaren & Co. as the shippers, and made the wheat deliverable to the account of W. G. Fitch, cashier, care Merchants' Bank, Watertown, New York. Fitch was the cashier of the plaintiffs.

The bills of lading were indorsed to the Merchants' Bank of Watertown, with special instructions thereon not to deliver the wheat until the said several drafts drawn against the shipments respectively were paid. The Merchants' Bank of Watertown received the drafts and bills of lading, and presented the drafts to A. F. Smith & Co. for payment as to the sight drafts, and acceptance as to those which were drawn on time. A. F. Smith & Co. were the proprietors of an elevator at Oswego, known as the Corn Exchange Elevator. The three letters inclosing the drafts upon the three different cargoes, were dated respectively: Sep. 6, 1869, Sep. 16, 1869, and Oct. 1, 1869. Upon each of the above dates J. F. Moffatt, Cashier of the Merchants' Bank of Watertown, wrote a letter (those of Sep. 6 and 16 being addressed to "Proprietors of Corn Exchange Elevator, Oswego, N. Y.," and that of Oct. 1, to "A. F. Smith & Co., Proprietors of Corn Exchange Elevator, Oswego, N. Y."), inclosing an order for the delivery of each one of the cargoes shipped from Milwaukee, with orders to hold the same until the payment of the drafts drawn against the cargoes of the respective vessels. None of the time drafts, except the first upon the cargo of The Kate Kelly, were paid. The Kate Kelly arrived in Oswego with her cargo Sep. 16, 1869; The Grenada arrived Sep. 24, and The Corsican Oct. 6. The wheat, for the alleged conversion of which this action was brought, consisted of the following parcels, shipped by A. F. Smith & Co. to New York:

1. 3,047 bushels laden on the canal-boat Four Sisters.

2. 7,100 bushels laden on the canal-boat Hagaman.

See 1 Otto.

3. 4,858 bushels laden on the canal-boat Anna Rebecca.

4. 7,836 bushels laden on the canal-boat George Ames.

The principal facts in dispute related to the identity of this wheat, the plaintiffs claiming that it came from the cargoes of The Kate Kelly, The Grenada and The Corsican. Under the instructions of the court below, the verdict of the jury in favor of the plaintiffs settled this controverted question of fact in their favor. A. F. Smith & Co., on receiving the canal-boat bills of lading, sent the same with sight drafts attached through banks in New York City to Dows & Co., the defendants below and plaintiffs in error here. The following were the dates and amounts of these drafts:

The Four Sisters, \$9,546. Sep. 18, 1869.

Hagaman, \$8,733. Sep. 27, 1869.

Anna Rebecca, \$7,700. Oct. 8, 1869.

George Ames, \$6,284.52. Oct. 8, 1869.

Dows & Co. paid the first of these drafts, Sep. 20; the second, Sep. 29, and the third and fourth, Oct. 11. The bills of lading were delivered to them at the time of payment.

The Milwaukee Bank learned the latter part of October that its wheat had been shipped by A. F. Smith & Co., and William P. McLaren went to Oswego to look after the grain. Oct. 23, a telegram was sent to Dows & Co., from Oswego by McLaren, in the name of W. G. Fitch, Cashier of the National Exchange Bank of Milwaukee, notifying them that the wheat shipped on the canal-boats, Four Sisters, Hagaman, George Ames and Anna Rebecca, was the property of that Bank. The next day McLaren and one George I. Jones called on Mr. Dows, in New York. It was agreed that if no attempt was made to stop the wheat on the canal, Dows would cause the wheat to be put in store in such shape that each boat load could be identified, and that the Milwaukee Bank should be notified of its arrival. On the arrival of the wheat, Dows & Co. gave notice, and a formal demand for it was made on behalf of the National Exchange Bank of Milwaukee. Dows & Co. refused to deliver the same unless they were paid the amount of their advances to A. F. Smith & Co., and charges which they had paid on the cargoes, and unless the Milwaukee Bank would take off an order given by A. F. Smith & Co. to one Norris Winslow on Dows & Co., for any margins in their hands due A. F. Smith & Co.

Further details of the case appear in the opinion.

Messrs. C. Van Santvoord, W. M. Evarts and Geo. F. Comstock, for plaintiffs in error:

The transmission of the invoice on the shipment, to the consignment of the Merchants' Bank, in accordance with the contract on its acceptance and compliance with its conditions, was an appropriation, by the acts of both parties, of the wheat shipped, to the use of A. F. S. & Co., which passed the property.

Richardson v. Dunn, 2 Ad. & E., N. S., 217; *Alexander v. Gardner*, 1 Bing, N. C., 671; *The Merrimack*, 8 C. R., 318, 329.

A. F. Smith & Co., in possession of the correspondence containing the contract for the purchase of their immediate use and on a credit, and the invoice with the letters inclosing them, show

ing the purchase and shipments for their account, with no other condition than the acceptance and payment of the sight draft and acceptance of the time draft, and knowing that it was shipped under their arrangement with McL. & Co. for delivery to them through the Merchants' Bank as their bank, and under the agreement of that Bank to be responsible for the wheat if the drafts were not paid, might conclude, either that these instructions of which they were notified were unauthorized, or were intended to secure the responsibility of the Merchants' Bank to plaintiff on its agreement so to be responsible to it, which was made in reliance upon their, A. F. S. & Co.'s responsibility, or that the object of these instructions was to secure the appropriation of the proceeds in payment of the drafts. But certainly no one of mercantile education or ordinary sagacity in their situation, under the circumstances, would infer that the intention was that the wheat should be held, according to the literal import of these instructions, until the time drafts matured and were paid, for this would defeat the very object and purpose of the purchase and consignment for their immediate use.

By the law of the State of New York, when the owner of property or goods or choses in action not negotiable, confers upon another only an apparent title or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto, without knowledge of the claim of the true owner.

McNeil v. Bk., 46 N. Y., 325; *Moore v. Bk.*, 55 N. Y., 41; *Pickering v. Bunk*, 15 East, 38.

The claim of the defendants to protection stands on as strong a ground or stronger than that of a *bona fide* purchaser from mortgagor in possession of merchandise, with power of control under an unrecorded mortgage, as in *Thompson v. Blanchard*, 4 N. Y., 303, or of a *bona fide* purchaser from a vendee in possession obtained by fraud, as in *Paddon v. Taylor*, 44 N. Y., 371, or *McCombie v. Spader*, 3 T. & C., 690; *Rawls v. Dasher*, 3 Keyes, 575; *S. O.*, 28 How. Pr., 66; see, also, cases of chattel mortgages on goods in store: *Grinold v. Sheldon*, 4 N. Y., 581; *Edgell v. Hart*, 9 N. Y., 213; *Ford v. Williams*, 24 N. Y., 359; 3 R. S. N. Y., 5th ed., 222, sees. 9, 10; Com. Dig. Covin, A, B, B 3; Vin. Abr., Fraud, L. pl., 4.

As to the damages, the plaintiff put in evidence the gross amount or rate sales in New York of the parcels of wheat claimed, without any deduction for freight paid or charges.

The defendant offered to prove the amount of foreign freight and charges; the plaintiff objected and the judge excluded the evidence. Defendant asked the judge to charge the jury that the allowance of interest upon the value was a matter in their discretion. The judge charged to the contrary, and defendant excepted.

Mr. H. M. Finch. for defendant in error:

The National Exchange Bank of Milwaukee acquired the title to the wheat shipped on board the schooners Kate Kelly, Grenada, and Corsican, by the transactions which took place between itself and the firm of Wm. P. McLaren & Co.

The Aurora, 4 C. Rob., 213; *The Frances*, 8 Cranch, 354; *The Merrimack*, 8 Cranch, 317; *The Frances*, 8 Cranch, 418; *St. Joes Indiano*, 1 Wheat., 208; *Seymour v. Newton*, 105 Mass., 216

273; *Bk. v. Daniels*, 47 N. Y., 632; *Turner v. Trustees Liverpool Docks*, 6 Exch., 543; *Van Cuttel v. Booker*, 2 Ex., 691; *Wait v. Baker*, 2 Exch., 1; *Ward v. Taylor*, 56 Ill., 494; *Shepherd v. Harrison*, L. R., 4 Q. B., 195; *Bailey v. R. R. Co.*, 49 N. Y., 75; *Pomeroy v. De Wills*, Am. Law Rec., July, 1873, 1; *Tilden v. Minor*, 45 Vt., 196; *Jenkyns v. Usborne*, 49 Eng. C. L., 698; *Williams v. Littlefield*, 12 Wend., 362; *Monkes v. Nicolson*, 115 Eng. C. L., 296; *Ellershaw v. Magniac*, 6 Exch., 570; *Jenkyns v. Brown*, 68 Eng. C. L., 495; *Brandt v. Boulby*, 2 B. & Ad., 932.

The Merchants' Bank was a special agent for a special purpose, and clothed only with special and limited powers to do a particular act with particular parties named.

Russell v. Minor, 22 Wend., 659; *Lyon v. Kent*, 45 Ala., 664; *Wooster v. Sherwood*, 25 N. Y., 287; *Wilson v. Nason*, 4 Bosw., 155; *Parsons v. Webb*, 8 Me., 38; *Cowan v. Adams*, 10 Me., 374-380; *Hodge v. Combs*, 1 Black, 192 (66 U. S., XVII., 157); *Doubleday v. Kress*, 50 N. Y., 410.

The Merchants' Bank had a legal right to select the corn exchange elevator as the warehouse in which to store the wheat until the maturity of the time drafts.

Kimberly v. Patchin, 19 N. Y., 330; *Burton v. Curyea*, 40 Ill., 320; *Gibson v. Stevens*, 8 How., 384; *Thayer v. Dwight*, 104 Mass., 257; *Schotsmans v. L. & Y. R. Co.*, L. R., 1 Eq. Cas., 357; *Wooster v. Sherwood* (*supra*); *Hamilton v. Bell*, 10 Exch., 545; *Whitefield v. Brand*, 16 M. & W., 282.

The long line of authorities, which hold that when a sale is conditional and the seller retains some special claim on the goods, until the discharge of which title is not to pass, the allowing the vendee to take them is not considered as an absolute surrender of possession by the vendor, so as to give the title to the vendee until the condition is performed, sustains the proposition.

Coggill v. R. R. Co., 3 Gray, 545; *Couse v. Tregent*, 11 Mich., 65; *Deshon v. Bigelow*, 8 Gray, 159; *Brown v. Haynes*, 52 Me., 578; *Hotchkiss v. Hunt*, 49 Me., 213; *Parmies v. Catherwood*, 36 Mo., 479; *Ullman v. Barnard*, 7 Gray, 554; *Miller v. Stevens*, 100 Mass., 518; *Hirschhorn v. Canney*, 98 Mass., 150; *Herring v. Hoppock*, 15 N. Y., 409; *Palmer v. Hand*, 13 Johns., 434; *Cragin v. Coe*, 29 Conn., 53; *Ballard v. Burgett*, 47 Barb., 646; *Kimball v. Jackman*, 42 N. H., 242; *Fisk v. Ewen*, 46 N. H., 173; *Buckmaster v. Smith*, 23 Vt., 203; *Holmark v. Molin*, 5 Cold. (Tenn.), 489; *Moakes v. Nicolson*, 115 Eng. C. L., 290; *Hunter v. Warner*, 1 Wis., 141; *Ballard v. Burgett*, 40 N. Y., 314; *Austin v. Dye*, 46 N. Y., 500; *McGeldrick v. Willis*, 52 N. Y., 318; *Clark v. Wells*, 45 Vt., 4.

A. F. Smith & Co. were the proprietors of a large warehouse in the City of Oswego. This fact was known to the Merchants' Bank. The Merchants' Bank had no authority from the Milwaukee Bank to make an unconditional delivery of the wheat to A. F. Smith & Co. Its authority, as already shown, was of a very special and limited character. It was necessary that the wheat be stored until the drafts matured; and the Merchants' Bank selected, as it might legally do, the corn exchange elevator, as a

warehouse in which to store it. Having the right to select a warehouse, the question is: did the Bank select that warehouse and make delivery of the cargoes into it for the account of the Milwaukee Bank? This question must be settled by the construction of the letters addressed to the "Proprietors of the Corn Exchange Elevator," and the orders inclosed in those letters, to the captains of the lake vessels. The letters and orders are in writing, and the language in them is plain and unambiguous. They express, in explicit language, the intent and purpose of the Merchants' Bank and, therefore, it is the duty of the court to interpret and construe them.

Brook v. Hook, 6 Law Rep. Ex., 93; *Ranney v. Higby*, 5 Wis., 70; *Easer v. Linderman*, 71 Pa., 80; *U. S. v. Shaw*, 1 Clif., 317.

The letters of the Merchants' Bank and the orders to the captains of the lake vessels clearly show that the wheat was to be delivered to the corn exchange elevator for the account of Wm. G. Fitch, Cashier, subject to the order of the Merchants' Bank.

Messrs. Dows & Co. acquired no title to the wheat in question, under and by virtue of any provision of the Act of the State of New York entitled An Act for the Amendment of the Law Relative to Principal and Factors or Agents.

Warner v. Martin, 11 How., 224; *Colvill v. Hill*, 4 Den., 329; *Dows v. Porrin*, 16 N. Y., 325; *Bonito v. Mosquera*, 2 Bosw., 452; *Stevens v. Wilson*, 6 Hill, 512; *Stevens v. Wilson*, 8 Den., 472; *Covell v. Hill*, 6 N. Y., 374; *Hickox v. Buckingham*, 18 How., 191 (59 U. S., XV., 345); *Decan v. Shipper*, 35 Pa., 239; *Bk. v. R. R. Co.*, 13 N. Y., 628; *Brower v. Peabody*, 13 N. Y., 121; *Kingsford v. Merry*, 1 Hurl. N., 508; *Blossom v. Champion*, 37 Barb., 554; *Hardman v. Booth*, 1 Hurl. & Colt., 802; *Jackson v. Hale*, 14 How., 525; *Heyman v. Flewker*, 106 Eng. C. L., 527; *Lamb v. Attenborough*, 101 Eng. C. L., 881; *Monk v. Whittenbury*, 23 Eng. C. L., 205; *Wood v. Rowcliffe*, 6 Hare, 191; *Zachrisson v. Ahman*, 2 Sandf., 68; *Van Casteel v. Booker*, 2 Exch., 691; *Jenkyns v. Osborne*, 49 Eng. C. L., 678; *Florence Sewing Machine Co. v. Warford*, 1 Sweeny, 443; *Fuentes v. Montis*, L. R. 3 C. P., 268; *S. C. L. R.*, 4 C. P., 98; *Elliott v. Bidwell*, 51 N. Y., 644; *Wilson v. Numa*, 4 Bosw., 155; *Cook v. Adams*, 1 Bosw., 504.

Messrs. Dows & Co. acquired no title to the wheat by the rules of the common law.

Mitchell v. Hawley, 16 Wall., 650 (83 U. S., XXI., 324); *Ballard v. Burgett*, 40 N. Y., 316; *McNeil v. Bk.*, 46 N. Y., 329; *Taylor v. Pope*, 5 Cold., 416; *McGoldrick v. Willits*, 52 N. Y., 612.

The authorities are too numerous to be cited in this brief, affirming the principle that the owner of chattels or merchandise cannot be divested of his title thereto without his consent. This principle has been affirmed so often and in such a variety of cases, that we shall content ourselves with only citing some of the leading ones.

McGoldrick v. Willits, 52 N. Y., 612; *Wright v. Ames*, 2 Keyes, 221; *Ballard v. Burgett*, 40 N. Y., 314; *Austin v. Dye*, 46 N. Y., 502; *Fawcett v. Osborn*, 32 Ill., 411; *Linnen v. Cruger*, 40 Barb., 636; *Saltus v. Everett*, 20 Wend., 275; *Spraghtons v. Hawley*, 39 N. Y., 441; *Cook v. Baul*, 1 Bosw., 497; *Williams v. Morle*, 11 Wend.,

80; *Evans v. Wells*, 22 Wend., 324; *Andrews v. Diesterich*, 14 Wend., 31; *McMahon v. Sloan*, 12 Pa., 229; *Bailey v. Shaw*, 4 Fost. N. H., 297; *Brown v. Wilmerding*, 5 Duer, 225; *Anderson v. Nicholas*, 5 Bosw., 129; *Wooster v. Sherwood*, 25 N. Y., 286; *Warner v. Martin*, 11 How., 209; *Lecky v. McDermott*, 8 Serg. & R., 500; *Stanley v. Gaylord*, 1 Cusb., 586; *Hotchkiss v. Hunt*, 49 Me., 213; *Roland v. Gundy*, 5 Ohio, 102; *Strahorn v. Union St. & T. Co.*, 43 Ill., 424; *Burton v. Curycs*, 40 Ill., 320; *Hartop v. Hoare*, 2 Str., 1187; *Taylor v. Pope*, 5 Cold., 413; *Lehigh Co. v. Field*, 8 Watts & S., 232.

Messrs. Dows & Co. have no lien upon the wheat for money paid by them for its transportation from Oswego to N. Y. City.

Van Buskirk v. Purinton, 2 Hall, 561; *Robinson v. Baker*, 5 Cusb., 137; *Clark v. R. R. Co.*, 9 Gray, 232; *Stevens v. R. R. Co.*, 8 Gray, 262; *Guilford v. Smith*, 30 Vt., 74; *The Anne*, 1 Mas., 512.

Mr. Justice Strong delivered the opinion of the court:

The verdict of the jury having established that the wheat came to the possession of the defendants below (now plaintiffs in error), and that there was a conversion, there is really no controversy respecting any other fact in this case than whether the ownership of the plaintiffs had been divested before the conversion. The evidence bearing upon the transmission of the title was contained mainly in written instruments, the legal effect of which was for the court; and so far as there was evidence outside of these instruments, it was either uncontradicted, or it had no bearing upon the construction to be given to them. We have, therefore, only to inquire to whom the wheat belonged when it came to the hands of the defendants, and when they refused to surrender it at the demand of the plaintiff.

It is not open to question that McLaren & Co., having purchased it at Milwaukee and paid for it with their own money, became its owners. Though they had received orders from A. F. Smith & Co. to buy wheat for them, and to ship it, they had not been supplied with funds for the purpose, nor had they assumed to contract with those from whom they purchased on behalf of their correspondents. They were under no obligation to give up their title or the possession on any terms other than such as they might dictate. If, after their purchase, they had sold the wheat to any person living in Milwaukee or elsewhere, other than A. F. Smith & Co., no doubt their vendee would have succeeded to the ownership. Nothing in any agency for A. F. Smith & Co. would have prevented it. This we do not understand to be controverted. Having, then, acquired the absolute ownership, McLaren & Co. had the complete power of disposition; and there is no pretense that they directly transmitted their ownership to A. F. Smith & Co. They, doubtless, expected that firm to become purchasers from them. They bought from their vendors with that expectation. Accordingly, they drew drafts for the price; but they never agreed to deliver the wheat to the drawees, unless upon the condition that the drafts should be accepted and paid. They shipped it; but they did not consign it to A. F. Smith & Co., and they sent to

that firm no bills of lading; on the contrary, they consigned the wheat to the cashier of the Milwaukee Bank, and handed over to that Bank the bills of lading as a security for the drafts drawn against it—drafts which the Bank purchased. It is true, they sent invoices. That, however, is of no significance by itself. The position taken on behalf of the defendants, that the transmission of the invoices passed the property in the wheat without the acceptance and payment of the drafts drawn against it, is utterly untenable. An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title. It seems unnecessary to refer to authorities to sustain this position. Reference may, however, be made to *Shepherd v. Harrison*, L. R. 5 Eng. & Ir. Ap. Cas., 116, and *Newcomb v. R. R. Co.*, 115 Mass., 230. In these and in many other cases it has been regarded as of no importance that an invoice was sent by the shipper to the drawee of the drafts drawn against the shipment, even when the goods were described as bought and shipped on account of and at the risk of the drawee.

It follows that McLaren & Co. remained the owners of the wheat, notwithstanding their transmission of the invoices to A. F. Smith & Co. As owners, then, they had a right to transfer it to the plaintiff as a security for the acceptance and payment of their drafts drawn against it. This they did by taking bills of lading deliverable to the cashier of the plaintiff, and handing them over with the drafts when the latter were discounted. These bills of lading, unexplained, are almost conclusive proof of an intention to reserve to the shipper the *jus disponendi*, and prevent the property in the wheat from passing to the drawees of the drafts. Such is the rule of interpretation as stated in Benjamin on Sales, p. 306; and in support of it he cites numerous authorities, to only one of which we make special reference, *Jenkyns v. Brown*, 14 Q. B., 496. There it appeared that the plaintiff was a commission merchant, living in London, and employing Klingender & Co. as his agents at New Orleans. The agents purchased for the plaintiff a cargo of corn, paying for it with their own money. They then drew upon him at thirty days' sight, stating in the body of the drafts that they were to be placed to the account of the corn. These drafts they sold, handing over to the purchaser with them the bills of lading, which were made deliverable to the order of Klingender & Co., the agents; and they sent invoices and a letter of advice to the plaintiff, informing him that the cargo was bought and shipped on his account. On this state of facts, the court ruled that the property did not pass to the plaintiff; that the taking of a bill of lading by Klingender & Co., deliverable to their own order, was nearly conclusive evidence that they did not intend to pass the property in the corn; and that, by indorsing the bills of lading to the buyer of the bills of exchange, they had conveyed to him a special property in the cargo, so that the plaintiff's

right to the corn could not arise until the bills of exchange were paid by him. That such is the legal effect of a bill of lading taken deliverable to the shipper's own order; that it is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased, even when the shipment has been made in the vessel of the drawee of the drafts against the cargo, has been repeatedly decided. *Turner v. Liverpool Docks*, 6 Exch., 543; *Schotsmans v. R. Co.*, L. R., 2 Ch. Ap., 336; *Ellershaw v. Magniac*, 6 Exch., 570, *n.* In the present case, the wheat was not shipped on the vessels of A. F. Smith & Co., and the bills of lading stipulated for deliveries to the cashier of the Milwaukee Bank. When, therefore, the drafts against the wheat were discounted by that Bank, and the bills of lading were handed over with the drafts as security, the Bank became the owner of the wheat, and had a complete right to maintain it until payment. The ownership of McLaren & Co. was transmitted to it, and it succeeded to their power of disposition. That the Bank never consented to part with its ownership thus acquired so long as the drafts it had discounted remained unpaid, is rendered certain by the uncontradicted written evidence. It sent the drafts, with the bills of lading attached, to the Merchants' Bank, Watertown, accompanied with the most positive instructions, by letter and by indorsement on the bills, to hold the wheat until the drafts were paid; and when, subsequently, the Merchants' Bank sent orders to the masters of the carrying vessels to deliver it to the "Corn Exchange Elevator, Oswego, N. Y.," they accompanied the orders with letters to Smith & Co., the proprietors of the elevator, containing clear instructions to hold the grain and "deliver" it only on payment of the drafts. To these instructions A. F. Smith & Co. made no objection. Now, as it is certain that whether the property in the wheat passed to A. F. Smith & Co. or not depends upon the answer which must be given to the question whether it was intended by McLaren & Co. or by the Milwaukee Bank, their successors in ownership, that it should pass before payment of the drafts, where can there be any room for doubt? What is there upon which to base an inference that it was intended A. F. Smith & Co. should become immediate owners of the wheat, and be clothed with a right to dispose of it at once? Such an inference is forbidden, as we have already said, by the bills of lading made deliverable to W. G. Fitch, Cashier of the Milwaukee Bank; and it is inadmissible, in view of the express orders given by that Bank to their special agent, the Merchants' Bank at Watertown, directing it to hold the wheat subject to the payment of the drafts drawn against it. No intent to vest immediate ownership in the drawees of the drafts can be implied in the face of these express arrangements and positive orders to the contrary. It is true that A. F. Smith & Co. were the proprietors of the Corn Exchange Elevator, and that the wheat was handed over to the "custody of the elevator" at the direction of the Merchants' Bank; but it cannot be claimed that that was a delivery to the drawees under and in pursuance of their contract to purchase. The Merchants' Bank, having been only special agents of the owners, had no power to make

such a delivery as would divest the ownership of their principals. *Stollenwerk v. Thacher*, 115 Mass., 224. And they made no attempt to divest that ownership. They guardedly retained the *jus disponendi*. Concurrently with their directions that the wheat should be delivered to the elevator, in the very orders for the delivery, they stated that the cargoes were for the account of W. G. Fitch, Cashier, and were to be held subject to their order. By accompanying letters to the proprietors of the elevator, they stated that the cargoes were delivered to them "to be held subject to and delivered only on payment of the drafts drawn by McLaren & Co." All this contemplated a subsequent delivery, a delivery after the receipt of the grain in the elevator, and when the drafts should be paid. It negatives directly the possibility that the delivery into the elevator was intended as a consummation of the purchase, or as giving title to the purchasers. It was a clear case of bailment, utterly inconsistent with the idea of ownership in the bailees. A man cannot hold as bailee for himself. By the act of accepting goods in bailment he acknowledges a right or title in the bailor. When, therefore, as was said in the court below, "the proprietors of the Corn Exchange Elevator, or A. F. Smith & Co., received the wheat under the instructions of the Merchants' Bank, they received it with the knowledge that the delivery to them was not absolute; that it was not placed in their hands as owners, and that they were not thereby to acquire title." They were informed that the holders of the drafts and bills of lading had no intention to let go their ownership so long as the drafts remained unpaid. The possession they had, therefore, was not their possession. It belonged to their bailors; and they were mere warehousemen, and not vendees.

We agree that, where a bill of lading has been taken containing a stipulation that the goods shipped shall be delivered to the order of the shipper, or to some person designated by him other than the one on whose account they have been shipped, the inference that it was not intended the property in the goods should pass, except by subsequent order of the person holding the bill, may be rebutted, though it is held to be almost conclusive; and we agree that, where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading—in other words, where there is anything to rebut the effect of the bill—it becomes a question for the jury, whether the property has passed. Such was the case of *Wigg v. Shuter*, L. R., 10 C. P., 159. There the ordinary effect of a bill of lading deliverable to the shipper's order was held to be rebutted by the court sitting with power to draw inferences of fact. The delivery to the carrier was "free on board," and the bill of lading was sent to the consignor's agent. The goods were also delivered into the purchaser's bags, and there was a part payment. But in this case there are no circumstances to rebut the intent to retain ownership exhibited in the bills of lading, and confirmed throughout by the indorsements on the bills, and by the written instructions to hold the wheat till payment of the drafts. Nothing in the evidence received or offered tended to show any other intent. Hence there was no

necessity of submitting to the jury the question, whether there was a change of ownership. That would have been an invitation to find a fact of which there was no evidence. The circumstances as relied upon by the plaintiffs in error, as tending to show that the property vested in A. F. Smith & Co., cannot have the significance attributed to them.

It is certainly immaterial that the wheat was consigned to W. G. Fitch, Cashier, care of the Merchants' Bank, Watertown, and that it was thus consigned at the request of A. F. Smith & Co., made to McLaren & Co. Had it been consigned directly to that Bank, and had there been no reservation of the *jus disponendi* accompanying the consignment, the case might have been different. Then an intent to deliver to the purchasers might possibly have been presumed; but, as the case was, no room was left for such a presumption. The express direction to hold the wheat for the payment of the drafts, and to deliver it only on payment, removes the possibility of any presumed intent to deliver it while the drafts remained unpaid. A shipment on the purchaser's own vessel is ordinarily held to pass the property to the purchaser; but not so if the bill of lading exhibits a contrary intent—if thereby the shipper reserves to himself or to his assigns the dominion over the goods shipped. *Turner v. Liverpool Docks*, cited *supra*. There are many such decisions. A strong case may be found in the Court of Queen's Bench, decided in 1840. It is *Mitchell v. Ede*, 11 Ad. & Ell., 888. A Jamaica planter, being the owner of sugars and indebted to the defendant, residing in London, for more than their value, shipped them at Jamaica, on the 4th of April, on a ship belonging to the defendant which was in the habit of carrying supplies to Jamaica to the owner of the sugars and others, and taking back consignments from him and others. On the same day he took a bill of lading by which the goods were stipulated to be delivered to the defendant at London, he paying freight. Two days afterwards (April 6), the shipper made an indorsement on the bill that the sugars were to be delivered to the defendant only on condition of his giving security for certain payments, but otherwise to the plaintiff's agent. He also drew drafts on the defendant. At the same time he indorsed the bill of lading, and delivered it to the plaintiff, to whom he was indebted. The bill was never in the defendant's hands. The sugars arrived in London, and the defendant paid the drafts drawn by the shipper, but did not comply with the conditions of the indorsement of April 6. On this state of facts, it was held by the court that the plaintiff was entitled to the sugars; that the shipper had not parted with the property by delivering it on board the defendant's ship, employed as it was, nor by accepting the bill of lading as drawn on the 4th of April; and that he was entitled to change the destination of the sugars till he had delivered them or the bill. In the case now in hand, there never was an instant, after the purchase of the wheat by McLaren & Co., when there was not an express reservation of the right to withhold the delivery from A. F. Smith & Co., and also an avowed purpose to withhold it until the drafts should be paid. Consent to consign the wheat to W. G. Fitch, Cashier, care of

Merchants' Bank, amounts, therefore, to no evidence of consent that it should pass into the control and ownership of the purchasers.

It has been argued on behalf of the plaintiffs in error that the correspondence between A. F. Smith & Co. and McLaren & Co. shows that the wheat was wanted by the former to supply their immediate need; and that, therefore, it was a legitimate inference that both parties to the correspondence intended an immediate delivery. If this were so, it was still in the power of the vendors to change the destination of the property until delivery was actually, or at least symbolically, made; and that the intention, if any ever existed, was never carried out, the bills of lading prove. It may be that A. F. Smith & Co. expected to secure early possession of the wheat by obtaining discounts from the Watertown bank, and then by taking up the drafts. If so, it would account for their request that the drafts and bills of lading might be sent through that bank; but that has no tendency to show an assent by either McLaren & Co. or the Milwaukee Bank to an unconditional delivery of the property before payment of the drafts.

Nor does the fact, that any engagement to hold themselves responsible for the safe-keeping of the wheat for the plaintiff and subject to its orders until the drafts drawn against it should be paid, was exacted from the Watertown bank, have any tendency to prove such an assent. This was an additional protection to the continued ownership of the plaintiff; and the words of the engagement plainly negative any consent to a divestiture of that ownership.

Without reference, therefore, to the testimony of McLaren—which was, in substance, that, before the shipments, the agent of A. F. Smith & Co. was informed that while the shipping firm would agree to send their time drafts through any bank he might designate, and consign the property to any responsible bank A. F. Smith & Co. might designate, they would adhere to their positive business rule in such cases, and on no account consent that any property so shipped should pass out of the control of the banks in whose care it had been placed until all drafts made against it had been paid—without reference to this, we think it clear that the ownership of the wheat, for the conversion of which the defendants were sued, never vested in A. F. Smith & Co., never passed out of the plaintiff.

This is a conclusion necessarily drawn from the written and uncontradicted evidence; and there is nothing in any evidence received or offered by the defendants and overruled by the court, which has any tendency to resist the conclusion. It is unnecessary, therefore, to examine in detail the numerous assignments of error in the admission and rejection of evidence. None of the rulings have injured the defendants.

If, then, the Exchange Bank of Milwaukee was the owner of the wheat when A. F. Smith & Co. undertook to ship it to the defendants, and when the defendants received it and converted it to their use, the right of the Bank to recover in this action is incontrovertible. A. F. Smith & Co. were incapable of divesting that ownership. The defendants could acquire no title, or even lien, from a tortious possessor.

However innocent they may have been (and they were undoubtedly innocent of any attempt to do wrong), they could not obtain ownership of the wheat from any other than the owner. The owner of personal property cannot be divested of his ownership without his consent, except by process of law. It is not claimed and it could not be that the defendants were deceived or misled by any act of the plaintiff. They are the victims of a gross fraud perpetrated by A. F. Smith & Co.; and, however unfortunate their case may be, they cannot be relieved by casting the loss upon the plaintiff, who is at least equally innocent with themselves, and who has used the extremest precaution to protect its title.

It is sufficient to add that, in our opinion, there is no just reason for complaint against the instruction given by the circuit judge to the jury, and his rulings upon the subject of damages and interest.

The judgment is affirmed.

Cited—89 Pa. St., 160, 161; 74 N. Y., 584, 125 Mass., 8; 48 Am. Rep., 434.

In *Dows v. Ins. Co.* [No. 17], error to the Circuit Court for the Southern District of New York,

(Same counsel on both sides.)

Mr. Justice Strong delivered the opinion of the court:

This case differs in no essential particulars from that of *Dows v. Bank* [*ante*, 214]. It presents the same questions and is controlled by the same rules of law.

The judgment must, therefore, be affirmed.

MARY E. SANGER, *Plff. in Err.*,

CLARK W. UPTON, Assignee in Bankruptcy
of THE GREAT WESTERN INSURANCE COMPANY.

(See S. C., 1 Otto, 56-64.)

Suit by assignee in bankruptcy—payment of stock of corporation, when ordered—stock cannot be diverted—stockholder, how liable.

1. An order of court that the assignee in bankruptcy should proceed to collect a demand, is conclusive as to the right of the assignee to bring suit thereon. The defendant in the suit cannot draw into question the validity of the order.

2. The assignee is subrogated to all the rights, legal and equitable, of the bankrupt corporation, and may file a bill in equity against all the delinquent shareholders jointly, or bring a separate action at law in each case.

3. The bankrupt court may order payment of the stock of a company adjudged to be bankrupt, the same as the directors might have done, before the decree in bankruptcy.

4. A resolution or agreement by the directors that no further call shall be made, is void as to creditors.

5. The capital stock of an incorporated company is a fund set apart for the payment of its debts, and it cannot be diverted from such purpose.

6. One to whom certificates of stock have been issued and who has received a dividend on them is estopped from denying his ownership of them.

[No. 85.]

Argued Nov. 8, 1875. Decided Nov. 29, 1875.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the District Court of the United States for the Northern District of Illinois, by the defendant in error against the plaintiff in error, to recover money claimed to be due from him as a stockholder in the Great Western Insurance Company, as an unpaid balance on the capital stock. There was verdict and judgment for the plaintiff in the district court, which was affirmed by the circuit court.

The case further appears in the opinion.

Mrs. H. S. Monroe, Geo. H. Williams and L. H. Bisbee, for the plaintiff in error:

An order or judgment of the court, to be *res judicata*, must have the necessary conditions precedent of jurisdiction over the person against whom it operates. In this case Mrs. Sanger was a stranger to the local proceeding. A judgment against a party, without notice of some kind as provided by law, is void.

R. R. Co. v. Trimble, 10 Wall., 367 (77 U. S., XIX., 948); *Kerr v. Watts*, 6 Wheat., 560; *Lenox v. Notrebe*, Hemp., 251.

The court having jurisdiction of and notice having reached the corporation, it does not follow that a stockholder had notice, or that the court had jurisdiction of a stockholder.

Whitman v. Cox, 26 Me., 335; *Rand v. Proprs., etc.*, 3 Day, 441; *Bk. v. Cook*, 4 Pick., 405; *Merrick v. Coul Co.*, 61 Ill., 472.

Mr. L. H. Bontell, for defendant in error:

It is claimed that the stockholders are not bound by the order of the district court, because they were not parties nor privies in that proceeding. To give this objection any validity, this order must be regarded as a judgment *in personam*. If it were so, may it not be said that these stockholders were parties, in the larger legal sense of that term as defined by Mr. Greenleaf, which includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings and to appeal from the judgment?

1 Greenl. Ev., secs. 522-524; *Robbins v. Chicago*, 4 Wall., 672 (71 U. S., XVIII., 480).

As a corporation is made up of its individual stockholders, when it is in bankruptcy its stockholders must be considered as before the court, so far, at least, as to be chargeable with notice of all proceedings therein affecting the company; but there is no propriety in regarding this order as a judgment *in personam*. If it is to be regarded as a judgment at all, it was rather in the nature of a judgment *in rem*.

See *Ward v. Grinnoldville Man. Co.*, 16 Conn., 593; *Adler v. Milwaukee Pat. Brick Mfg. Co.*, 13 Wis., 31; *Ex parte Dowdney*, 15 Ves., 498; *Ogilvie v. Ins. Co.*, 22 How., 880 (63 U. S., XVI., 349); *Upton v. Hansbrough*, 3 Bis., 417; Bankrupt Act of 1867, sec. 1, p. 37; *Ang. & Ams. Corp.*, 9th ed., 599, 604; 1 Redf. Railw., sec. 50; *Scammon v. Kimball*, 4 Chicago Leg. News, 284; *Sawyer v. Hoag*, 17 Wall., 610, 619 (54 U. S., XXI., 731, 735); *Hall v. Ins. Co.*, 5 Gill (Md.), 484; *Pentz v. Hawley*, 1 Barb. Ch., 122; *Pettibone v. McGraw*, 6 Mich., 441; *Sagory v. Dubois*, 3 Sandf. Ch., 466.

If the order of the district court was valid, nothing remained to be done for the plaintiff in error but to pay the balance due on his stock on demand. Failing to do this, an action at law was the proper method of enforcing payment.

See 1 Otto.

Mr. Justice Swayne delivered the opinion of the court:

Several errors are assigned and relied upon touching the admission of evidence and the instructions given to the jury.

We shall give our views of the case as it is presented in the record, so as to meet these objections without adverting specifically to any of them.

The original charter of the Great Western Insurance Company fixed its capital at \$100,000. By an amendment of the charter, the capital was increased to \$5,000,000. It became insolvent. A petition was filed against it in the District Court of the United States for the Northern District of Illinois; and on the 6th of February, 1872, it was adjudged a bankrupt. On the 11th of April, 1872, the defendant in error was appointed its assignee in bankruptcy. Upon the application of the assignee, the district court made an order that the balance unpaid upon the stock held by the several stockholders should be paid to the assignee on or before the 15th day of August, 1872; that notice of the order should be given by publication in a newspaper or otherwise; and that, in default of payment, the assignee should proceed to collect the amount due from each delinquent. The assignee gave notice by publishing the order accordingly, and by mailing a copy, with a demand of payment, to each stockholder. The plaintiff in error was so notified. It was claimed that she was the owner of \$10,000 of the stock, upon which it was alleged there was due sixty per cent. The original charter required the payment of five per cent. of the capital stock, and that the balance should be secured in the manner prescribed. The amended charter is silent upon the subject. The stock certificates issued by the company set forth that twenty per cent. was to be paid in four quarterly installments of five per cent. each, "The balance being subject to the call of the directors as they may be instructed by the majority of the stockholders represented at any regular meeting."

This was a regulation of the company, and not a requirement of either the original or amended charter. It did not appear that any call was ever made by the directors, or authorized by the stockholders.

The plaintiff in error having failed to pay pursuant to the order of the court, this suit was instituted by the assignee.

The order was conclusive as to the right of the assignee to bring the suit. Jurisdiction was given to the district court by the Bankrupt Act, R. S., sec. 4972, to make it. It was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and, for the same reasons, she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose. She might have applied to the district court to revoke or modify the order. Had she done so, she would have been entitled to be heard; but it does not appear that any such ap-

plication was made. As a stockholder, she was an integral part of the corporation. In the view of the law, she was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion. *Hall v. Ins. Co.*, 5 Gill, 484; *Sagory v. Dubois*, 3 Sandf. Ch., 467.

This court has applied the same rule to an order made by the Comptroller of the Currency, under the 50th section of the National Bank Act, appointing a receiver, and directing him to proceed to make collections from the stockholders of an insolvent bank. *Kennedy v. Gibson*, 8 Wall., 505 [75 U. S., XIX., 478].

In that case it was said: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or any part, and, if a part, how much should be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. Its validity is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him."

This principle was applied also in *Cadle v. Baker*, 20 Wall., 650 [87 U. S., XXII., 448].

It was competent for the court to order payment of the stock, as the directors under the instruction of a majority of the stockholders might, before the decree in bankruptcy, have done. The former is as effectual as the latter would have been. It may, perhaps, be well doubted whether the stockholders would have voluntarily imposed such a burden upon themselves. The law does not permit the rights of creditors to be subjected to such a test. It would be contrary to the plainest principles of reason and justice, to make payment by the debtor for such a purpose in anywise dependent upon his own choice. A court of equity has often made and enforced the requisite order in such cases. The Bankrupt Court possessed the same power in the case in hand. The order rests upon a solid foundation of reason and authority. *Ward v. Mfg. Co.*, 16 Conn., 599; *Adler v. Brick Mfg. Co.*, 13 Wis., 61; *Sagory v. Dubois* [*supra*]; *Man v. Pentz*, 3 Sandf. Ch., 257.

A resolution or agreement that no further call shall be made is void as to creditors. 3 Sandf. Ch., *sup.* An agreement that a stockholder may pay in any other medium than money is also void as a fraud upon the other stockholders, and upon creditors as well. *Henry v. R. R. Co.*, 17 Ohio, 187. The owner of stock cannot escape liability by taking it in the name of his infant children. *Roman v. Fry*, 5 J. J. Marsh, 684. Nor is it any defense to show that the holder took and held the stock as the agent of the corporation, to sell for its benefit. *Allibone v. Hager*, 46 Pa. St., 48.

The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships.

When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation. *Curran v. Arkansas*, 15 How., 308; *Wood v. Dummer*, 3 Mas., 308; *Sles v. Bloom*, 19 Johns., 474; *Briggs v. Penniman*, 8 Cow., 387; *Society, etc., v. Abbott*, 2 Beav., 559; *Wallworth v. Holt*, 4 Mylne & C., 619; *Ward v. Mfg. Co.* [*supra*]; *Fowler v. Robinson*, 31 Me., 189; *Angell & A. Corp.*, sec. 600, and *post*; *Petrie v. Wright*, 6 Sm. & M., 647; *Nathan v. Whitlock*, 3 Edw. Ch., 215; 4 Am. L. Mag., 93.

The earliest authority upon the point under consideration is *Salmon v. Hamborough Co.*, decided in 1670. 1 Cas. in Ch., 204; 6 Vin. Abr., 310, 311. The bill in that case alleged that Salmon held a bond of the company of eighteen hundred pounds, given to him for lent money. The company was incorporated, and had power to assess rates upon cloths, in which it dealt, "And, by poll on every member, to defray the charges of the company." The company had imposed rates accordingly,—to wit: "4s. 6d. upon every white cloth exported, and divers others—and thereby raised eight thousand pounds per annum," etc.

"And the bill did charge, that, the company having no common stock, the plaintiff had no remedy at law for his debt; but did charge that their usage had been to make taxes, and levy actions upon the members and their goods, to bear the charge of their company to pay their debts; and did complain that they now did refuse to execute that power; and did particularly complain against divers of the members by name, that they did refuse to meet and lay taxes, and that they did pretend want of power by their charter to lay such taxes; whereas, they had formerly exercised power, and thereby gained credit: whereupon the plaintiff lent them two thousand pounds, which was for the use and support of the company's charge, and so ought to be made good by them, and so prayed to be relieved."

The company, though served with a process, failed to appear. "But divers particular members, being served in their natural capacities, did appear and demur for that they were not in that capacity liable to the plaintiff's demand." The Lord Chancellor sustained the

demurrer and, as to them, dismissed the bill. The case was taken by appeal to the House of Lords. There the decree of the Chancellor was reversed, and the case was remanded to his court, with directions to cause the officers of the company "to make such *leviation* upon every member of said company who is to be contributory to the public charge as shall be sufficient to satisfy the said sum to be decreed to the plaintiff in this cause, and to collect and levy the same, and to pay it over to the plaintiff as the court shall direct." Ample provision was made in the decree for the enforcement of this order. See, also, *Curson v. African Co.*, decided in 1682, 1 Vern., 121.

By the deed of assignment, all the property and effects of every kind, which belonged to the company when the petition to have it declared a bankrupt was filed, passed to the assignee. R. S., sec. 5044; Bump, Bkcy., 473, 478. He was clothed with the power and duty to sue whenever suit was necessary. The statute in terms gave him the same right in any litigation he might institute which the bankrupt would have had "if the decree in bankruptcy had not been rendered, and no assignment had been made. R. S., sec. 5047; Bump, Bkcy., 528. The liability of the plaintiff in error, and the right and title of the company, were legal in their character. If the company had sued, it might have sued at law. The rights of the company passed to the assignee, and he also could enforce them by a legal remedy. The assignee was subrogated to all the rights, legal and equitable, of the bankrupt corporation. This suit was, therefore, well brought in the form adopted. *Hall v. Ins. Co.*, 5 Gill, 484.

The assignee might have filed a bill in equity against all the delinquent shareholders jointly. (*Agilis v. Ins. Co.*, 22 How., 380 [63 U. S., XVI., 349].) But if the company is utterly insolvent, in any event, a separate action at law in each case is much to be preferred. It is cheaper, more speedy and more effectual. If the contingency should occur that the assets realized exceed the liabilities to be met, the district and circuit courts will see that no wrong is done to those adversely concerned. It is not to be doubted that this power will be exercised upon all proper occasions.

Upon the trial, a large mass of testimony was given by the plaintiff, consisting of a prospectus and the original charter of the company, certified copies of the papers in the office of the Secretary of State touching the amendment to the charter, the deed of the register to the assignee, the petition of the assignee and order of the district court relative to further stock payments, and proof of the publication of the order, and of the sending of a copy of the order, with a demand of payment, to the defendant by mail. The admission of all this evidence was excepted to. Further testimony was given tending to prove that the defendant bought and received from the company two stock certificates of \$5,000 each dated March 10, 1870, in the usual form, and in all respects complete, except that there was a blank for the name of the owner, which was not filled up. And further:

"Then said defendant paid for said stock twenty per cent. of the par value of the same, paying ~~part~~ of said twenty per cent. in north-western land scrip, and giving her notes for the

balance of said twenty per cent. which notes were duly paid to said company; and that said stock stood in her name upon the books of said company, and that there was evidence introduced tending to show that she received a dividend from said company thereon:

And that, shortly after the fire of Oct. 9, 1871, General Stewart, the president of the company, and brother of defendant, paid for her a call of twenty per cent. made upon said certificates of stock by the company; but that said defendant never authorized such payment, but repudiated the same, and that no more than forty per cent. had ever been paid on said stock.

No evidence was introduced tending to show that said defendant ever subscribed for said certificates of stock or for any stock of said company, or that her name appeared on any list of stockholders of said stock circulated by said company.

No other express contract was shown to have been made between said company and defendant."

The court charged the jury, in effect, that, if they believed the testimony, the defendant was liable. The charge was excepted to by the defendant. It was clearly correct. The only question was, whether she owned the stock. No one else claimed it. The certificates were issued and delivered to her. They belonged to her. They were the muniments of her title. She could have filled the blanks with her name whenever she thought proper. She had paid to the company all that was then payable, and subsequently received a dividend. Her name was placed upon the stock list. These facts were conclusive against her. She was estopped from denying her ownership. She could not assert her title if there were a profit, and deny it if there were a loss. The certificates showed the par of the stock and the amount to be paid. Upon receiving them, the law implied an agreement on her part to respond to the balance whenever called upon in any lawful way to do so. No special express agreement, written or oral, was necessary. The former was as obligatory as the latter could have been. It would be a mockery of justice to permit such an objection to prevail. *Ellis v. Schmoeck*, 5 Bing., 521; *Doubleday v. Muskett*, 7 Bing., 110; *Harvey v. Kay*, 9 Barn. & Cress., 356; *Upton v. Tribilcock*, not yet reported [*ante*, 208].

Where there are defects in the organization of a corporation which might be fatal upon a writ of *quo warranto*, a stockholder, who has participated in its acts as a corporation *de facto*, is estopped to deny its rightful existence. *Haton v. Aspinwall*, 19 N. Y., 119; *Abbott v. Aspinwall*, 26 Barb., 202.

Where a party executes a deed-poll, reserving rent, and the grantee enters into possession, he is under the same liability to pay such rent as if the deed were an indenture *inter partes*, and he had executed it. The law implies a promise to pay which may be enforced by an action of *indebitatus assumpsit*. *Goodwin v. Gilbert*, 9 Mass., 484. It has been held frequently in cases of this class, where the instrument was under seal and executed by only one of the parties, that covenant would lie against the other. *Finley v. Simpson*, 2 Zab., 811.

We find no error in the record, and the judgment is affirmed.

Cited—91 U. S., 71; 93 U. S., 667, 669; 96 U. S., 329, 330; 103 U. S., 508; 105 U. S., 152; 8 Ben., 362; 16 Bk. Reg., 585; 17 Bk. Reg., 490; 1 Hughes, 161; 5 Dill., 373; 7 Sawy., 31, 34; 22 N. Y., 541; 28 Hun, 128; 97 Ill., 550; 37 Am. Rep., 136.

BENJAMIN CARVER, *Plff. in Err.*,

v.

CLARK W. UPTON, Assignee of THE GREAT WESTERN INSURANCE Co., a Bankrupt.

(See S. C., 1 Otto, 64.)

The decision of this case is controlled by the opinion in *Sanger v. Upton*, assignee, ante, 220.

[No. 84.]

Argued Nov. 8, 1875. Decided Nov. 29, 1875.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This suit was an action in *assumpsit* brought in the U. S. District Court by the assignee of the Great Western Insurance Company, a bankrupt, against the plaintiff in error, to recover money claimed to be due from him as a stockholder and as an unpaid balance on capital stock.

The case is substantially the same as the next preceding one.

Mr. John H. Thomson, for plaintiff in error:

It is well settled that a judgment or decree against a party, without service of process or any step to bring him into court is void, and that one who is neither a party nor privy is not bound by a decree nor judgment.

R. R. Co. v. Trimble, 10 Wall., 867 (77 U. S., XIX., 948); *Kerr v. Watts*, 6 Wheat., 560; *Lenox v. Notrebe*, Hemp., 251.

This ruling can only be sustained upon the ground that the court had jurisdiction over the stockholders by virtue of having jurisdiction over the Company.

This ground is not tenable. The Corporation is a distinct entity. A stockholder is not a party to a proceeding against it by virtue of being a stockholder.

Whitman v. Cox, 26 Me., 335; *Rand v. Proprietors, etc.*, 3 Day, 441; *Bk. v. Cook*, 4 Pick., 405; *Merrick v. Coal Co.*, 61 Ill., 472.

By the express terms of the certificate of stock issued by the Company to the defendant, the eighty per cent. sought to be recovered in this action was to remain subject to the call of the directors, as they might be instructed by a majority of the stockholders at any regular meeting. No such call has ever been made.

The plaintiff cannot collect this balance, and has no remedy in an action at law.

By the Bankrupt Act the jurisdiction of the district court extends "to the collection of all the assets of the bankrupt." This jurisdiction is to be exercised in suits at law or in equity. The district court, sitting as a court of equity, and, so far as this claim is concerned, with full equity powers, was and is open to the defendant in error to enforce this claim.

Morgan v. Thornhill, 11 Wall., 65 (78 U. S., XX., 60); *Goodall v. Tuttle*, 8 Biss., 219; *Shearman v. Bingham*, 7 N. B. Reg., 490.

This money was payable on a contingency which has not happened and cannot be recovered

in an action at law. If an assignee has rights he must enforce them in a proper form of action.

Foster v. Hackley, 2 N. B. Reg., 417; *Stouffer v. Coleman*, 1 Yeates, 399; *In re Lyon*, 7 N. B. Reg., 182; 2 Pars. Con., 675.

The call of the directors, instructed, etc., was a condition precedent to the plaintiff's right to recover in an action at law.

Brown v. Overbury, 11 Exch., 615; *Scott v. Corporation, etc.*, 28 L. J. Ch., 236; *Scott v. Avery*, 25 L. J. Exch., 808; *Spangler v. I. & I. C. R. Co.*, 21 Ill., 276; *McAuley v. Carter*, 22 Ill., 53; *Ellis v. Hubbard*, 4 Ind., 208; *Taylor v. Fletcher*, 15 Ind., 90; *R. R. Co. v. Dunn*, 29 Me., 587; *R. R. Co. v. Hickman*, 28 Pa., 318.

The call made in the order of the United States District Court cannot have the effect or take the place of the call provided for in the certificate of stock.

The jurisdiction of the district court in bankruptcy proceedings, is defined and limited by the bankrupt law, and does not put the judge or the court in the place of the directors and stockholders of a bankrupt corporation.

Mr. L. H. Boutell, for defendant in error:

Mr. Justice Swayne delivered the opinion of the court:

The decision of this case is controlled by the opinion of the court just delivered in the case of *Sanger v. Upton*, No. 85 [ante, 220].

The judgment of the Circuit Court is affirmed.

Cited—16 Bk. Reg., 530.

UNITED STATES, *Appl.*,

v.

THE UNION PACIFIC RAILROAD COMPANY.

(See S. C., 1 Otto, 72-91.)

Obligation of Union Pacific Railroad Company to pay bonds of United States.

1. Under the Acts of Congress, the Union Pacific R. R. Co. is obliged to pay the United States bonds, issued to aid in its construction, at their maturity.

2. The words "at their maturity," mean at the maturity of the bonds when the principal falls due, and do not require the Company to pay each installment of interest as it falls due.

[No. 571.]

Argued Oct. 27, 1875. Decided Nov. 29, 1875.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. Edwards Pierrepont, *Atty. Gen.*, for plaintiff in error:

The plain meaning and intent of Congress is apparent from the four Statutes when construed together; and the question remitted to the court is, whether the United States is entitled, under the charter which the Company formally accepted, to retain the whole value of the services rendered the United States, towards payment of the interest advanced by the Government upon the bonds loaned by the Company; and it is further claimed, so far as this question might be embarrassed by the Acts of 1864 and 1871, that these Acts are repealed by the Act of 1873.

The suit of the Company is to recover for one half the value of the services rendered, and

the judgment below is for that only; but the counter claim set up by the Government was dismissed, and the whole question of the liability of the Company to pay the interest on the government bonds before their maturity, at the end of thirty years, is fairly before the court.

The Union Pacific Railroad Company is a private Corporation. *R. R. Co. v. Peniston*, 18 Wall., 81 (85 U. S., XXI., 791).

The principles of statutory construction, in a case like this, are well defined.

Ins. & T. Co. v. Debolt, 16 How., 485; *R. R. Co. v. Litchfield*, 23 How., 88 (64 U. S., XVI., 509); Op. of Atty-Gen. Black, 9 Ops. Attys-Gen. 59

There is no difficulty in ascertaining the true intent and meaning of the statutes relating to this Company.

Take the Act of 1862, which granted the charter:

"Sec. 5. And be it further enacted, that, for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this Act, issue to said Company bonds of the United States of \$1,000 each, payable in thirty years after date, bearing six per centum per annum interest, said interest payable semi-annually, which interest may be paid in United States Treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the payment to the United States, as hereinafter provided, of the amount of the said bonds so issued and delivered to said Company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the Company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued."

There is nothing ambiguous about this; the Government proposes to advance its bonds to the Company, bearing interest at six per cent., said interest payable semi annually.

To secure these bonds according to their terms, and not otherwise, the Company agreed by formal assent, under section 7 of the Act, to give a first mortgage, and the mortgage was executed when the Company received the bonds.

To illustrate: a banker of high credit loans his bond to a merchant of lesser credit, and the borrower of the bond agrees to give a mortgage upon his house to secure the bond; no one would doubt that the mortgage to secure the bond must be given in accordance with the terms of the bonds. No one would advocate the insane proposition that the merchant had complied with his contract by tendering a mortgage, with interest postponed thirty years, when the bond he borrowed paid interest half-yearly, although the bond itself ran thirty years before maturity.

But the very next section (6) not only provided that the Company agree to give a first mortgage to secure the bonds according to their

Sec 1 Otto,

tenor, but also agree to give additional security for the interest, as well as the principal.

The next step is to consider the Act of 1854, by which immense and new advantages and donations were bestowed upon the Company. By section 4 of this prodigal Act, the mineral land reserved to the United States was declared not to include coal and iron land.

By section 5 the time was extended one year, and provided also, "That only one half of the compensation for services rendered for the Government by said Company shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said road."

By section 7 it is provided, "That so much of section 17 of said (original) Act as provides for a reservation by the Government of a portion of the bonds to be issued, to aid in the construction of said road, is hereby repealed."

By section 8 it is provided that bonds may issue when only a part of the work required by the charter is done.

Section 9 gives power to the Company to construct bridges and establish ferries.

Section 10 allows the Company to issue its first mortgage bonds of even tenor, date, maturity and interest, and amount with the government bonds loaned, and "The lien of the United States shall be subordinate to that of the bonds of the Company."

Section 15 provides for consolidating roads, etc.

Section 18 provides that the United States shall extinguish Indian titles.

Section 19 provides for the issuing of patents.

The last section is as follows:

"Congress may, at any time, alter, amend or repeal this Act."

By this Act of free gifts the Company is required to assume nothing, to do nothing and assent to nothing; but the absolute right to amend or repeal is, indeed, reserved.

We next come to the Act of Mar. 3, 1871, entitled, "An Act Making Appropriations for the Support of the Army for the Year Ending June 30, 1872, and for Other Purposes." This Act is somewhat long, and at page 525, 16 Stat. at L., will be found a little section, number 9, in which are these words:

"The Secretary of the Treasury is hereby directed to pay over in money to the Pacific Railroad Company mentioned in said Act, and performing services for the United States, one half of the compensation, at the rate provided by law for such services heretofore or hereafter rendered; *Provided*, That this section shall not be construed to affect the legal rights of the Government or the obligations of the Company except as herein specifically provided."

This was passed just after Attorney-General Akerman had decided that the Secretary was not authorized to pay the money. See Ops. 18, 800. It is true that the Act provides that no construction shall be given to that section which shall affect the legal rights of the Government or the obligations of the Company. Of course, the Secretary began to pay the Company as the statute directed, and continued to pay the interest on the bonds loaned to the Company. Two years sufficed to develop the iniquities which were perpetrated under cover of these statutes,

and Congress passed the Act of Mar. 3, 1873, above cited, by which the Secretary is forbidden to pay the Company, and under which the whole question is remitted to the courts. Stat. at L., 17, p. 508, sec. 2.

Section 4 provides for bringing a suit in equity against this corporate absorber of the public property, which suit is now pending in this court.

The fact that the Company, under the Act of 1864, issued its mortgage to secure its bonds for the same amount as the Government advanced, and made the interest on said mortgage bonds payable half-yearly, is conclusive as to the understanding of the Company when it filed its assent to the charter; and after issuing that mortgage in compliance with the statute, it is discreditable to claim that it understood that the Government interest was not to be paid until the bonds matured.

By section 5, Act of 1862, and the assent filed, the R. R. Co. agreed that the receipt of the government bonds should, *ipso facto*, constitute a first mortgage on the whole line of the railroad to secure the bonds. To secure what bonds? Why, the bonds which the road received. And what bonds did the road receive? Bonds bearing interest at six per cent. payable half-yearly; not payable at the end of thirty years. The mortgage is to secure just these bonds according to their tenor, not some other bonds of entirely different tenor.

If the bill had read that the mortgage given by the road to secure the government bonds, whose interest was payable half-yearly, should be so construed as to allow the road to postpone all its interest until the end of thirty years, not an honest man in that entire Congress would have voted for it, and no reputable man believes that the bill could have received a single uncorrupted vote.

The \$28,000,000 which the Government has loaned to the Company the Government has borrowed and pays interest half-yearly at the rate of six per cent. per annum. Every dollar of interest which the Government pays half-yearly it borrows, and pays for it also interest half-yearly at the same rate.

At the maturity of the bonds the Government pays thus, to wit:

	\$ 28,000,000.00
Meanwhile the Government has paid interest, - - - - -	186,964,886.87

Then the Government will have paid - - - - -	\$164,964,886.87
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The Company claims that, if it is bound to pay any interest at all, it is not due until the bonds mature and, therefore, it will be bound to pay for the bonds - - - - -	\$28,000,000.00
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And interest only at the end of thirty years, - - - - -	50,400,000.00
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Thus the Company will have paid but - - - - -	\$78,400,000.00
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But the Government will have paid for interest alone, \$186,964,886.87; and, during all these thirty years, will also have been making constant cash payments at full rates for the Company's services.

The learned counsel below referred to the

debates in Congress to support his construction of the statutes. It has often been held that such debates could have no just influence.

Aldridge v. Williams, 3 How., 1; 6 Op. (Cush.), 464; 9 Ops. (Black), 57.

But the debate cited, when it is taken entire, proves the very contrary of that for which it is cited.

58th Cong. Globe (1861-62), 1911.

Those parts of the Acts of 1864 and 1871 which directed payment, without consideration, of one half the earnings above mentioned, are clearly repealed by the Act of 1873, and it is now left to this court to say what are the "legal rights and obligations" of the Government and the Corporation, under the charter which the Company accepted, and the law as it now stands.

See, 58th Cong. Globe (1861-62), 1911.

Mr. White's amendment proposed that the road should be compelled to pay the interest within thirty days (not thirty years) after the Government had advanced it.

Mr. Campbell, in charge of the bill, openly, on the floor of the Congress, said:

"I am clearly of opinion that the gentleman has not studied faithfully the provisions of this bill. * * * It is the intention of the bill that the interest shall be paid semi-annually to the Government."

Of course Mr. White's amendment was voted down.

This, to quote from the opinion of the judge below, "Seems decisive of the legislative intent."

Messrs. S. Bartlett, E. W. Stoughton and J. P. Usher, for appellees. (An argument by *Mr. B. R. Curtis* before the Senate Judiciary Committee was also filed):

We concede that, in all charters whose entire purpose and effect is to confer bounties on corporations, in consideration of advantages to the general public, the indisputable rule is that, in case of doubt, the construction is to be in favor of the Government.

The rule must be confined to charters making yearly endowments, with no stipulation for services or for pecuniary returns by the party endowed.

Charles River Bridge v. Warren Bridge, 11 Pet., 420; *Ins. & T. Co. v. Debolt*, 16 How., 435; *R. R. Co. v. Litchfield*, 28 How., 88 (64 U. S., XVI., 509).

That the charter of the Union Pacific Railroad Company contains stipulations for services, priorities and pecuniary advantages secured to the Government, either by condition or contract, is recognized in the title and throughout the Act of 1862, and cannot be controverted.

Under the provisions of the Acts in question, we submit that, neither in terms nor by legal construction, is there contained in them any express or implied *assumpsit* or covenant by the Corporation on which by action at law or set off, Government can compel the Company to re-imburse either the principal or interest of the bonds issued by it.

We do not claim that the Government is not to be re-imbursed both principal and interest, nor that such re-imbursement is not secured to it by the charter. Our position is, that whenever the duty of re-imbursement arises, then the remedy is not by *assumpsit* or contract; and

that, as the set-off is based upon such *assumpsit*, if we are right, it must fail.

If the transaction were a mere loan of money by the Government, the law would, doubtless, imply a promise to repay it. But this was no loan of anything. It was a grant and issue of bonds payable at distant periods. By the same charter there is a large grant also of land for the same express purpose. Any implied *assumpsit* or covenant to re-imburse or pay the value, is as applicable to the one as to the other.

Throughout the charter, the provisions to protect the Government, we submit, are in clear terms either indisputable common law, strict conditions or a mortgage which is shaped as a strict condition, allowing no equity of redemption, but providing a mere summary forfeiture.

Are the words in the 6th section, "the grants aforesaid are upon condition," to be construed in their natural sense and in accordance with the scheme of the Government, apparent throughout the Act, to enforce its rights by condition of forfeiture, or are they to be held as implied covenants or *assumpsits* by the Company to pay said bonds and interests as they mature?

Of course they cannot be construed as a technical covenant.

The charter is in its character a deed-poll, and the grantees are recipients and not parties to execute it. The argument must be, that acceptance implies an *assumpsit* to perform the conditions.

We have no doubt that when a charter grants powers which, if acted upon, are to carry with them duties; and if the performance of these duties is secured, not by making the same the subject of condition and forfeiture, but by a declaration in the charter that it shall be the duty, or, "It shall be lawful for the Company and they are hereby required," such duties can be enforced by *mandamus* and possibly by bill, but not by *assumpsit* or action of contract.

Fork & N. M. Ry. Co. v. Regina, 18 Eng. L. & E., 199; *Great West. R. R. Co. v. Regina*, 18 Eng. L. & E., 211.

In case of mortgage where there has been no bond, note or covenant to pay, no suit for the mortgage money can be maintained.

Drummond v. Richards, 2 Munf., 337; 1 Pow. Mort., 60, n. a.

If any implied or expressed *assumpsit* or covenant to re-imburse the Government its payments, either principal or interest, can be found in the charter, then we submit that it is clear that the *assumpsit* or covenant to pay the interest is to pay the same as each and every bond or class of bonds matures, and not from time to time, each six months, as it shall have been paid by the Government.

We come, then, to an analysis of the charter to find what are its express or implied provisions as to the time or period at which the interest was to be re-imbursed to the Government.

1. The earliest clause is the mortgage clause set out in section 5, which contains two provisions, neither of which fixes in terms the period at which either bonds or interests are to be re-imbursed to the Government.

The first clause declares that the amount of both bonds and interests shall be paid "as hereinafter provided."

The second clause provides for such payment when required so to do by the Secretary of the

Treasury, in accordance with the provisions of this Act.

Resort must be had to the subsequent provisions to find if in either of them the time of payment is hereinafter provided. The only clause which refers to the time of payment is in the 6th section. The words of that section are: "The grants aforesaid are made on condition that the Company shall pay said bonds at maturity."

Now, literally, this provision is confined to the bonds merely; and construing, as the court is, a clause involving forfeiture of franchise and property, it may be open to contest whether interest was embraced by its terms. But assuming as we do that, by just construction, interest is to be re-imbursed, does the clause fix the time of re-imbursement as being any other than the maturity of the bonds? Will the law, under such circumstances, import into the Act the words, "And each semi-annual payment of interest as it accrues?"

If such had been the purpose, why was it not so plainly stated? Why was it left to inference, merely from the words "pay said bonds at maturity?" One thing would seem clear from the terms used, namely: that whatsoever payment was to be made, the period of such payment is definitely fixed as the maturity of the bonds; and if words are to be interjected so as to include interest, why should there be made by them a further alteration by the insertion of a new and different period for its payment?

It is believed that the above clauses are the only portions of the charter that refer in terms to the time of the re-imbursement of either bonds or interest; and we turn next to the clauses which provide for the mode of payment, either partial or entire, according to the sufficiency of the means to which they refer.

They are to be found in part of the clause of the 6th section, and are as follows:

"All compensation for services rendered for the Government shall be applied to the payment of the said bonds, with interest, until the whole amount is fully paid; * * * and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

Now, if it were possible to construe these clauses as a mere provision for a sinking fund, leaving the Company, on pain of forfeiture, to pay the whole interest semi-annually, they would have no bearing on the question under debate. But such construction cannot, it is submitted, be made. Not only is there no provision for investment of the funds and accumulation of interest and principal, but it is declared, as to one of the funds, that it is to be annually applied to the payment of both bonds and interest; and as to the other fund, that it shall be applied to the same purposes, which, unless there be some different provision, legally implies that it is to be applied as it is received.

We submit, then, that these clauses put an end to any claim that, by just construction, the Act requires the Company to re-imburse the Government, each six months, the amount of interest paid on its bonds. Such a claim must suppose that, notwithstanding that at the expiration of any six months, the Government shall have in its hands, funds of the Company from

the sources named, sufficient to pay, not merely the interest then falling due, but as the Act contemplates, possibly if not probably, an excess applicable to the bonds; and, notwithstanding the Act declares that those funds shall be applied to the payment of that interest, yet, that it was designed, nevertheless, and that the Act required, under pain of forfeiture, payment again of this very interest of the Company.

We have, thus, by reason of these provisions, an explanation of the clause in the 5th section, which declares the Company not to be in default, until refusal or failure of said Company to redeem said bonds or any part of them when required so to do by the Secretary of the Treasury, in accordance with the provisions of this Act.

We come, next, to the question of looking to those provisions as to the mode of repayment. At what time, if at all, if the Government may proceed by *assumpsit* for either bonds or interest, does the Act contemplate that there may be a default in the payment of interest? And we answer: such a default will occur at the maturity of each bond, if, from the sources thus provided, and upon a statement of the account and the application of the sums earliest due from the Government to the payment of the sums earliest due to the Government be they principal or interest, any such interest shall be found to be due.

This results from the fact that there is no provision in this clause for a statement of account by the Secretary of the Treasury each six months; and then, if the funds should prove insufficient for the payment of interest, that he shall make requisition upon the Company to pay the balance.

The only time of ultimate payment of either bonds or interest is fixed by the 6th section, namely: shall pay said bonds at maturity; under which, if any interpolation is to be made, it can only be one requiring interest to be paid, not semi-annually, but at maturity of the bonds.

It will be noted that these bonds were to be payable in thirty years from their respective issues, and that they were to be of dates scattered over the thirteen years allowed for construction, as each forty miles were completed. The fund thus provided for repayment would be first applicable to the payment of all accrued interest at the time of application, and next to the principal of the bonds earliest due, and so on to the end of the thirteen years.

Mr. Justice Davis delivered the opinion of the court:

The Union Pacific Railroad Company, conceding the right of the government to retain one half of the compensation due it for the transportation of the mails, military and Indian supplies, and apply the same to re-imburse the government for interest paid by it on bonds issued to the corporation to aid in the construction of its railroad and telegraph lines, seeks to establish by this suit its right to the other moiety. The United States, on the other hand, having paid interest on these bonds in excess of the sums credited to the company for services rendered by it, insists upon its right to withhold payment altogether. One of the grounds on which this right of retention is sought to be

maintained is by reason of the general right of set-off. It is true this right, as a general proposition, exists in the Government and is commonly exercised by it when settling with those having claims against it. But manifestly the rules applicable to ordinary claimants for services rendered the United States do not apply to this controversy. The bonds in question were issued by the United States in pursuance of a scheme to aid in the construction of a great national highway; in themselves they do not import any obligation on the part of the Corporation to pay, and whether, when the United States have paid interest on them, an obligation arises on the part of the Corporation to refund it, depends wholly on the conditions on which the bonds were delivered to the Corporation and received by it. These conditions are embodied in the legislation of Congress on the subject; and if, on a fair interpretation of this legislation the Corporation is found to be now a debtor to the United States, the deduction for interest paid on the bonds can be lawfully made. But if the converse of this proposition is ascertained to be true, the Government cannot rightfully withhold from the Corporation one half of its earnings.

In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The Act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams*, 3 How., p. 24; *Preston v. Browder*, 1 Wheat., 120.

Many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which surrounded Congress when the Act was passed. The war of the rebellion was in progress; and the country had become alarmed for the safety of the Pacific States, owing to complications with England. In case these complications resulted in an open rupture, the loss of our Pacific possessions was feared; but even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes its citizens. It is true, the threatened danger was happily averted, but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. And if it did nothing more than afford the required protection to the Pacific States, it was felt that the Government, in the execution of a plain duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain the people would not have sanctioned the action of Congress if it had departed from the traditional policy of the

country regarding works of internal improvements, and charged the Government itself with the direct execution of the enterprise.

This enterprise was viewed as a national undertaking for national purposes, and the public mind was directed to the end to be accomplished, rather than the particular means employed for the purpose. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of person and property. With its construction, the agricultural and mineral resources of this territory could be developed; settlements made where settlements were possible, and thereby the wealth and power of the United States essentially increased. And there was also the pressing want, in times of peace even, of an improved and cheaper method for the transportation of the mails, and supplies for the army and the Indians.

It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable.

Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad 2,000 miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally esteemed at the time to be a bold and hazardous undertaking. It is nothing to the purpose that the difficulties in the way of the undertaking after trial, in a great measure disappeared, and that the road was constructed at less cost of time and money than was considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things supposed to exist at the time, and no aid can be derived in the interpretation of its legislation from the consideration that the theory on which it proceeded turned out not to be correct. The project of building the road was not conceived for private ends; and the prevalent opinion was that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.

The policy of the country, to say nothing of the supposed want of power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and individual enterprise in the project. This Congress undertook to do, and the inducements held out were such as it was believed would procure the requisite capital and enterprise. But the purpose in presenting these inducements was to promote the construction and operation of a work deemed essential to the security of great public interests.

It is true, the scheme contemplated profit to individuals, for, without a reasonable expectation of gain, capital could not be obtained, nor the requisite skill and enterprise, but this consideration

does not in itself change the relation of the parties to this suit. This might have been so if the Government had incorporated a company to advance private interests, and agreed to aid it on account of supposed incidental advantages which would accrue to the public from the completion of the enterprise. But the Government proceeded on a wholly different theory. It promoted the enterprise to advance its own interests, and endeavored to enlist private capital and individual enterprise as a means to an end—the securing a road which could be used for governmental purposes. Whatever obligations, therefore, rest on the Company incorporated to accomplish this purpose, must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history.

It has been observed by this court, that the title of an Act, especially in congressional legislation, furnishes little aid in the construction of it, because the body of the Act, in so many cases, has no reference to the matter specified in the title. *Hadden v. The Collector*, 5 Wall., 110 [72 U. S., XVIII., 519]. This is true, and we have no disposition to depart from this rule, but the title, even, of the original Act of 1862, incorporating the defendant (12 Stat. at L., p. 489, seems to have been the subject of special consideration by Congress, for it truly discloses the general purpose Congress had in view in passing it. It is "An Act to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes." That there should, however, be no doubt of the national character of the work which Congress proposed to aid, the body of the Act contains these words: "And the better to accomplish the object of this Act—namely: to promote the public interest and welfare by the construction of said railroad, and telegraph lines, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may at any time, having due regard for the rights of said companies named therein, add to, alter, amend or repeal this Act." See 18th section of charter, 12 Stat. at L., p. 497. Indeed, the whole Act contains unmistakable evidence that, if Congress was put to the necessity of accomplishing a great public enterprise through the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be accomplished or the motives which influenced its course of action.

If it had been equally explicit in the provision regarding the bonds to be issued in aid of the road, there would have been no occasion for this suit. But, even in this particular, looking to the motives which led to the Act and the objects intended to be effected by it, we do not think there is any serious difficulty to get at the true meaning of Congress. The Act itself was an experiment, and must be considered in the nature of a proposal to enterprising men to engage in the work, for there was no certainty that capital with the untried obstacles in the way, could be enlisted. If enlisted at all, it

could only be on conditions which would insure, in case of success, remuneration proportionate to the risk incurred.

The proffered aid was in lands and interest-bearing bonds of the United States. There is no controversy about the terms on which the lands were granted, and the only point with which we have to deal relates to the nature and extent of the obligation imposed by Congress on the Company to pay these bonds. It is not doubted that the Government was to be reimbursed, both principal and interest, but the precise question for decision is, whether the Company was required to pay the interest before the maturity of the principal.

The solution of this question depends upon the meaning of the 5th and 6th sections of the original Act of 1862, and the 5th section of the amendatory Act of 1864. 12 Stat. at L., 492; 13 Stat. at L., 359. The 5th section of the original Act contains the undertaking of the Government, and the 6th defines the obligation of the company. By the 5th it is provided, that, on the completion of the road in sections of forty miles, there shall be issued and delivered to the Company a certain number of interest-bearing bonds of the United States, payable thirty years after date, with interest payable semi-annually. And "to secure the repayment to the United States, as 'hereinafter provided,' of the amount of said bonds, together with all interest thereon which shall have been paid by the United States," it was further provided that the issue and delivery of the bonds should constitute a first mortgage on the property of the Company, with a right reserved to the Government to declare a forfeiture and take possession of the road and telegraph line in case of "the refusal or failure of the Company to redeem said bonds, or any part of them, when requested to do so by the Secretary of the Treasury, in accordance with the provisions of the Act." The manifest purpose of this section is to take a lien on the property of the corporation for the ultimate redemption of the bonds, principal and interest, but the manner of redemption and time of it are left for further provision.

That the Government was expected, in the first instance, to pay the interest is clear enough, for the mortgage was taken to secure the repayment of the bonds, "together with all interest thereon which shall have been paid by the United States." This phrase implies a prior payment by the United States, whatever may be the duty of the Corporation in regard to reimbursement as subsequently defined. Besides this, when repayment is spoken of, it is understood that something has been advanced which is to be paid back. Apart from this, had it been the intention that the Corporation itself should pay the interest as it fell due, phraseology appropriate to such a purpose would have been used. But when and how the reimbursement was to be made was declared to be "as hereinafter provided," that is, in conformity with the terms prescribed in another portion of the Act. And that this is so, is evident enough from the latter part of the section, which directs the Secretary of the Treasury to enforce the forfeiture and take possession of the road on failure of the Corporation to redeem said bonds, or any part of them (referring to the

different periods of their issue) according to the plan of redemption thus provided. or, in other words, "in accordance with the provisions of this Act." The obligations imposed on the Corporation, or assumed by them in relation to the repayment of the bonds, are set forth entire in the next or 6th section, which, on account of its importance, is set forth at length.

"Sec. 6. And be it further enacted, That the grants aforesaid are made upon condition that said Company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall, at all times, transmit dispatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores, upon said railroad, for the Government, whenever required to do so by any department thereof; and that the Government shall, at all times, have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensations for services rendered for the Government, shall be applied to the payment of said bonds and interest, until the whole amount is fully paid. Said Company may also pay the United States wholly or in part, in the same or other bonds, treasury notes or other evidences of debt against the United States, to be allowed at par, and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

Leaving out of consideration the parts of this section not pertinent to the present inquiry, there are three things, and three only, which the Corporation is required to do concerning the bonds in controversy. 1. To pay said bonds at maturity. 2. To allow the Government to retain the compensation due the Corporation for services rendered, and apply the same to the payment of the bonds and interest, until the whole amount is fully paid. 3. To pay over to the Government, after the road shall have been fully completed, five per cent. of the net earnings of the road, to be appropriated to the payment of the bonds and interest.

If we take the language used in its natural and obvious sense, there can be no difficulty in arriving at the meaning of the condition "to pay said bonds at maturity," which was imposed upon this Corporation. As commonly understood, the word "maturity," in its application to bonds and other similar instruments, refers to the time fixed for their payment, which is the termination of the period they have to run. The bonds in question were bonds of the United States, promising to pay to the holder of them \$1,000, thirty years after date, and the interest every six months. This obligation the Government was required to perform, and, as the bonds were issued and delivered to the Corporation to be sold for the purpose of raising money to construct its road, it is insisted that Congress must have meant to impose a corresponding obligation on the Corporation. In support of this construction, it is sought to give to the word "maturity," a double signification, applying it to each payment of interest as it falls due, as well as to the principal. But this is extending the operation of words by a forced construction

beyond their natural and ordinary meaning, which is contrary to all legal rules. Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist. "We are bound," said *Justice* Buller, in an early case in the King's Bench, "to take the Act of Parliament as they have made it; a *casus omisus* can, in no case, be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not." *Jones v. Smart*, 1 Term Rep., 44-52.

Lord Chief Baron Eyre, in the case of *Gibson v. Mias* (1 H. Bl., 569-614), said: "I venture to lay it down as a general rule, respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely: that the words may bear the sense, which, by construction, is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them." This rule is as applicable to the language of a statute as to the language of a deed. The words "to pay said bonds at maturity," do not bear the sense which is sought to be attributed to them. They imply, obviously, an obligation to pay both principal and interest, when the time fixed for the payment of the principal has passed; but they do not imply an obligation to pay the interest as it accrues, and the principal when due. It is one thing to be required to pay principal and interest when the bonds have reached maturity, and a wholly different thing to be required to pay the interest every six months, and the principal at the end of thirty years. The obligations are so different, that they cannot both grow out of the direct words employed; and it is necessary to superadd other words in order to extend the condition so as to include the payment of semi-annual interest as it falls due. Neither on principle or authority is such a plain departure from the express letter of the statute warranted. And especially is this so, when the construction leads to so great an extension of a condition to defeat a grant.

The failure to perform the condition is cause of forfeiture. If the natural meaning of the words be adopted as the true meaning, there can be no forfeiture until the bonds themselves have matured. On the contrary, if the construction contended for be allowed, the grants made to the Corporation are subject to forfeiture on each occasion that six months' interest falls due and is not met. It would require a pretty large inference to draw from the language used, authority to enlarge, in a particular so essential, the terms of a condition assumed by the Corporation when it assented to the Act. Besides this, when Congress imposed this condition, it well knew that the undertaking of the Government bound it to pay to the holder of any bond, interest every six months, and the principal at the time the bond matured. With this knowledge, dealing as it did with the relations the Company were to bear to the Government on the receipt of these bonds, had it intended to exact of the Company the payment of interest before the maturity of the bonds, it would have declared its purpose in language about which there could be no misunderstanding. But if the words "to pay said bonds at maturity," do not give notice that this exaction was intended, neither do the other provisions of the 6th section 1 Otto.

tion. They created no obligation to keep down the interest, nor were they so intended. The proposition to retain the amount due the Company for services rendered and apply it towards the general indebtedness of the Company to the Government, can not be construed into a requirement that the Company shall pay the interest from time to time, and the principal when due. It was in the discretion of Congress to make this requirement, and then, as collateral to it, provide a special fund or funds out of which the principal obligation could be discharged. This Congress did not choose to do, but rested satisfied with the entire property of the Company as security for the ultimate payment of the principal and interest of the bonds delivered to it, and in the meantime with special provisions looking to the re-imbursement of the Government for interest paid by it, and the application of the surplus if any remained, to discharge the principal. The Company, for obvious reasons, might be very willing to accept the bonds of the Government on these terms, and very unwilling to come under an absolute promise to pay the current interest as it accrued. If it were in a condition, either during the progress of the work or on its completion, to earn anything, there was no hardship in the proposed application of the compensation due it; but it can be readily seen, if the Company were required to raise money every six months to pay interest, when all its available means were necessary to the prosecution of the work, the burden might be very heavy. Congress did not see fit to impose this burden, and place the Company in a position to risk the forfeiture of all its grants in case of failure to provide the means to pay current interest. Besides, it is fair to infer that Congress supposed that the services to be rendered by the road to the Government would equal the interest to be paid, and that this was not an unreasonable expectation, the published statistics of the vast cost of transporting military and naval stores and the mails to the Pacific coast by the ancient methods abundantly show.

The views presented regarding the provision—that the Government shall retain the compensation for services rendered by the Company either before or after the road is completed, are equally applicable to the provision that after the road is completed five per cent. of the net earnings of the road shall be annually applied to the payment of bonds and interest. It is not perceived how, on any principle of construction, an obligation of the Corporation to pay the interest on the bonds every six months after they shall have been issued can be predicated on the terms of this provision, any more than on the terms of the other. Both are reserved funds out of which the Government was to be re-imbursed in the first instance the interest it had paid, leaving the surplus, if any, to be applied to the payment of the principal of the bonds.

In addition to all that has been said, there is enough in the scheme of the Act, and in the purposes contemplated by it, to show that Congress never intended to impose on the Corporation the obligation to pay current interest. The Act was passed in the midst of war, as has been stated, when the means for national defense were deemed inadequate to the wants of the

country, and the public mind was alive to the necessity of uniting by iron bands the destiny of the Pacific States with those of the Atlantic. Confessedly, the undertaking was outside of the ability of private capital to accomplish, and only by the helping hand of Congress could the problem, difficult of solution under the most favorable circumstances, be worked out. Local business, as a source of profit, could not be expected while the road was in course of construction, on account of the character of the country it traversed; and whether when completed, as an investment, it would prove valuable, was a question for time to determine. But vast as the work was, limited as were the private resources to build it, the growing wants of the country, as well as the existing and future military necessities of the Government demanded that it be completed. Under the stimulus of these considerations Congress acted; it did not act for the benefit of private persons, nor in their interest, but for an object deemed essential to the security of the country as well as to the prosperity of the country.

Compelled, as it was, to incorporate a private Company to accomplish its object, it proffered the terms on which it would lend its aid, which, if deemed too liberal now, were then considered, with the lights before it, not more than sufficient to engage the attention of enterprising men, who, if not themselves capitalists, were in a position to command the use of capital. These terms looked to ultimate security rather than immediate re-imbursement, and for the obvious reason that the Corporation would require all its available means in construction; and to exact from it, while the work was in progress, the obligation to keep down the interest on the bonds of the United States would tend to cripple the enterprise at a time when the primary object with Congress was to advance it. There could, however, be no reasonable objection to the application "of all compensations for services rendered for the Government" from the outset, and "five per cent. of the net earnings after the completion of the road" to the payment of the bonds and interest, and these exactions were accordingly made.

Of necessity, there were risks to be taken in aiding with money or bonds an enterprise unparalleled in the history of any free people, which, if completed at all, would require as was supposed, twelve years in which to do it. But these risks were common to both parties, and Congress was obliged to assume its share, and advance the bonds, or abandon the enterprise, for obviously the grant of lands, however valuable after the road was built, could not be available as a resource with which to build it.

If the road were a success, in addition to the benefit it would be to the United States, the Corporation would be in a situation to repay advances for interest and pay the principal when due. If, on the contrary, the investment proved to be a failure, subjecting the private persons who embarked their capital in it to a total loss, there was left for the Government the entire property of the Corporation, of which immediate possession could be taken on a declaration of forfeiture.

In view of the circumstances under which the

Act of 1862 was passed, the purposes to be accomplished by it, appearing as they do in the title as well as the body of the Act, and constituting as they do the public history of this legislation, this brief summary presents, as we think fairly, its scope and effect, which are inconsistent with the position asserted by the appellant.

Notwithstanding the favorable terms proposed by Congress, the road languished, and the effect of this was the amendatory Act of 1864. By this the grant of lands was doubled, a second in lieu of a first mortgage accepted by the Government, and a provision inserted that "Only one half of the compensation for services rendered for the Government by said Companies (meaning this and the auxiliary Companies incorporated at the same time) shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said road."

This amendment was, without doubt, intended merely to modify the provision in the original Act, so as to allow the Government to retain only one half of the compensation for services rendered instead of all. Although the requirement in this provision is, that the compensation shall be applied to "the payment of the bonds," and in the former "to pay the bonds and interest," yet it cannot be supposed Congress intended to relinquish the right secured in the former Act to make the application in the first place to the interest, and then to the principal. The purpose of Congress could have been nothing more than to surrender on behalf of the Government the right to retain the whole of the Companies' earnings, and to accept in lieu of it, the right to retain the half, leaving unaffected by this change any right touching this subject secured in the former Act. The change was a very material one, and intended, doubtless, as a substantial favor to the Companies; but, on the principle contended for, it would prove, instead of this, to be of no value. Of what possible advantage could it be to these Companies to receive payment for one half of their earnings, if they were subject to a suit to recover it back as soon as it was paid? And this is the effect of the provision on the theory that the Companies are debtors to the Government on every semi-annual payment of interest. They could not, in the nature of things, have accepted the stipulation with an understanding that any such effect would be given it. If the Government consents to the diminution of its security, so that only half of the prices due for services are to be applied to the payment of the interest or principal, what is to become of the other half? Surely, there is no implication that the Government shall retain it; and, if not, who is to get it? Manifestly, the Companies who have earned the money.

It is very clear that the Congress of 1864 did not suppose, in making this concession, that it would be barren of results; but, as the rights of the parties have been settled by the construction given to the original provision on this subject, it is unnecessary to pursue the subject further.

The practice of the Government for a series of years was in conformity with the views we

have taken of the effect of the charter, until the Secretary of the Treasury arrested the payment of the money earned by the Companies for services rendered the Government, and directed that it be withheld. This action of the Secretary brought the subject to the attention of Congress; and the Act of March 3, 1871, 16 Stat. at L., p. 525, sec. 9, was passed, directing that one half of the money due the Pacific Railroad Companies for services rendered, either "herebefore or hereafter," be paid them, leaving open the question of ultimate right for legal decision.

After this, another Act was passed on this subject, by virtue of which this suit was instituted by the appellee in the Court of Claims. Act of March 3, 1873, sec. 2, 17 Stat. at L., p. 508. It is contended that the purpose of this Act is to repeal that portion of the charter of the Union Pacific Company containing the provision we have discussed. But, manifestly, the purpose was very different. It is true the Act directs the Secretary of the Treasury to withhold all payments to the Pacific Companies on account of freights and transportation, but at the same time it authorizes any company thus affected to bring suit in the Court of Claims for "such freight and transportation"; and in such suit "The right of such company to recover the same upon the law and the facts shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them." This means nothing more nor less than the remission to the judicial tribunals of the country of the question, whether this Company, and others similarly situated, had the right to recover from the Government one half of what it earned by transportation, which question was to be determined upon its merits.

The merits of such a question are determined when the effect of the charter is determined. It is hardly necessary to say that it would have been idle to authorize a suit to be brought if it were the intention to repeal the provision on which the suit could alone be predicated.

We cannot go into an argument on the consequences which follow our decision. Consequences are not an element to be considered in the determination of the question, whether an Act of incorporation is less beneficial to the Government than it supposed. And whether an Act of Congress be more or less politic and wise, it is not our province to determine. When we have declared the meaning of it, if there be power to pass it, our duty in connection with it is ended.

The judgment of the Court of Claims is affirmed.

I, James H. McKenney, Clerk of the Supreme Court of the United States, hereby certify that the foregoing is a true copy of the opinion of the court in the case of *The United States, Appellant, v. The Union Pacific Railroad Company*, No. 571, of October Term, 1875, as the same remains upon the official records of the said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Supreme Court at the City of Washington this thirty-first day of January, A. D. 1886.

[L. S.]

JAMES H. MCKENNEY,
Clerk U. S. Sup. Ct.

GEORGE W. LONG AND JOHN C. WATSON, *Plffs. in Err.*,

v.

JAMES W. CONVERSE, GEORGE M. BARTHOLOMEW AND J. GRAHAM GARDNER, RECEIVERS OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

(See S. C., 1 Otto, 105-114.)

Jurisdiction over state judgments—right claimed.

1. Under the Judiciary Act (which authorizes this court to re-examine the decisions of a State Court in cases where any title, right, privilege or immunity is claimed under any statute of the United States) and under the Act of Feb. 5, 1867, in order to give jurisdiction to this court, the party must claim the right for himself and not for a third person in whose title he has no interest.

2. As the plaintiffs in error in this case claim no title, right, privilege or immunity under a statute of the United States, this case must be dismissed for want of jurisdiction.

[No. 82.]

Argued Nov. 5, 1875. Decided Nov. 29, 1875.

IN ERROR to the Supreme Judicial Court of the State of Massachusetts.

The case is stated by the court.

Messrs. B. F. Butler and Causten Browne, for plaintiffs in error:

1. This was a final decree in a suit in equity in the highest court of law or equity of the State of Massachusetts.

2. There was drawn in question the validity of an authority exercised under a State, on the ground of its being repugnant to the laws of the United States, and the decision was in favor of such authority.

The receivers were officers of the State Court, and the validity of their authority as such officers, after bankruptcy of the Railroad Company and assignment of its property, was directly drawn in question on the ground of its being repugnant to the Bankrupt Law of the United States, and the decision was expressly in favor of such authority.

Messrs. B. F. Brooks, J. D. Ball and J. J. Storow, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

On the 20th of July, 1870, a bill was filed in the Supreme Judicial Court of Massachusetts for the foreclosure of a mortgage, executed by the Boston, Hartford and Erie Railroad Company, to secure the payment of certain bonds. The bill prayed a sale of the mortgaged property, and the appointment of receivers. Henry N. Farwell was named as one of the defendants, he being one of the trustees under the mortgage, and also one of the directors of the Company. Process was served upon him July 21, 1870.

On the 2d of August, 1870, an order was made appointing receivers, with authority to take possession of all the property of the Railroad Company, including all moneys, credits, choses in

NOTE.—*Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S.* See note to *Matthews v. Zane*, 8 U. S. (4 Cranch), 382; note to *Martin v. Hunter*, 14 U. S. (1 Wheat.), 304; and note to *Williams v. Norris*, 25 U. S. (12 Wheat.), 117.

action, evidences of debt, books, papers and vouchers.

On the first of March, 1871, the Railroad Company was adjudged a bankrupt by the District Court of the United States for the District of Massachusetts; and on the 18th of the same month an assignment of its property, according to the provisions of the Bankrupt Act, was made to Charles S. Bradley, Charles L. Chapman and George M. Barnard, as assignees. This assignment was made to include all the property of which the Company was possessed on the 21st of October, 1870.

On the 20th of September, 1871, the receivers of the Railroad Company filed in the Supreme Judicial Court their petition against George W. Long and John C. Watson, alleging, in substance, that, when the order appointing them receivers was made, Farwell had in his possession, as one of the officers of the Railroad Company, certain coupons of bonds of the Hartford, Providence and Fishkill Railroad Company, and of bonds of the City of Providence, which were the property of the Boston, Hartford and Erie Railroad Company, and which, by the decree, he was ordered to deliver to them; that the Railroad Company had no right to sell or transfer the coupons, or put them in circulation; that he had no right to the coupons or their possession; that, notwithstanding this, he had, subsequently to their appointment as receivers, transferred to Long and Watson five hundred of the coupons of the bonds of the City of Providence; and that Long and Watson, at the time, had full knowledge of the rights of the Railroad Company, and that Farwell had no power or authority to make the transfer.

The petitioners asked that Long and Watson might be ordered to deliver the coupons to them, and restrained from collecting the money due thereon.

Long and Watson answered this petition, denying that Farwell, at the time of the appointment of the receivers, held the coupons in trust for the Railroad Company, and averring that he held them as collateral security for a debt owing to him by the Hartford, Providence and Fishkill Railroad Company. Having no knowledge whether the Boston, Hartford and Erie Railroad Company had authority to sell the coupons, or put them in circulation, they left the petitioners to make such proof of that fact as they might deem material. They admitted the transfer to them by Farwell after the appointment of the receivers, but denied any knowledge of the rights of the Railroad Company, and averred that they purchased the coupons of Farwell in good faith, believing that he had the right to make the transfer.

Subsequently, on the 27th of June, 1872, they filed an amendment to their answer, setting up the bankruptcy of the Railroad Company and the assignment to the assignees, and concluding as follows: "Wherefore these respondents submit that the said petitioners had not, at the date of the filing of the said petition, if they ever had, any right to the possession of any of the property of the said Boston, Hartford and Erie Railroad Company, and particularly to the possession of the coupons in said petition alleged to be the property of the said Company, and in the possession of these respondents."

The cause was referred to a special master. Upon the coming in of his report, exceptions were filed; and at the April Term, 1872, an entry was made on the docket of the court, as follows: "Plaintiffs' exceptions sustained. Decree for the receivers upon the evidence reported." The cause was then continued. On the 28th August, 1872, the assignees in bankruptcy filed in the cause a paper addressed to the court, in which they represented, that "Having read * * * the proposed decree of this court against George W. Long and John C. Watson, ordering them to surrender and deliver up to the receivers the coupons of the bonds of the City of Providence described in the petition against them, we do assent to said decree, and to the delivery of the coupons to the receivers, as therein ordered."

Afterwards, on the 5th of May, 1873, a decree in form was entered by the court, in which it was "Found as a matter of fact, and further ordered, adjudged and decreed that the respondents, George W. Long and John C. Watson, took the interest coupons sought in this petition to be recovered of them, to wit: etc., under circumstances which preclude said Long and Watson from claiming the right of holders for value in good faith; and that, as against the petitioners in said petition, said Long and Watson acquired no better title to said coupons than Henry N. Farwell himself had, and that said Farwell had no right or title to the same; and that the right to the possession of and the title to said coupons are now in the petitioners. * * * notwithstanding the amended answer of said defendants and the alleged adjudication in bankruptcy and subsequent assignment made therein." Thereupon it was further decreed that the receivers recover of Long and Watson the money which it appeared they had collected during the pendency of the suit from the City of Providence upon the coupons received by them from Farwell.

To reverse this decree, the present writ of error has been prosecuted.

Our jurisdiction in this case depends upon the effect to be given to that provision of the Judiciary Act, 1 Stat. at L., 73, R. S., 709, which authorizes this court to re-examine the decisions of the highest court of a State in certain cases "where any title, right, privilege or immunity is claimed under" any statute of the United States.

The plaintiffs in error did not claim under the assignees in bankruptcy. They set up the title of the assignees, not to protect their own, but to defeat that of the receivers appointed by the State Court. They claimed adversely to both the receivers and assignees. They did not even allege that the assignees had ever attempted to assert title. The contest was one originally for the possession of certain papers. The decree for money was given, because, pending the suit, the papers sought for had been exchanged for money, and the receivers were willing to accept the exchange. In the absence of the assignees from the case, the decree could have no effect upon their title to the coupons or money. If, when the demand was made by the receivers, the plaintiffs in error had surrendered the coupons, that surrender would have been a complete defense to a future action by the assignees, inasmuch as they had not be-

fore that time asserted their claim, either by demand or notice. The title of the assignees to the property would not have been defeated by the transfer. Whatever rights they had against the plaintiffs in error could be enforced by an appropriate proceeding against the receivers. The whole effect of the surrender, so far as the assignees were concerned, was to transfer the custody of the property from the plaintiffs in error to the receivers. In this case the transfer was not voluntary, but in pursuance of a decree rendered by a court of competent jurisdiction, with the assent of the assignees. Under such circumstances, it is not easy to see how the assignees can proceed further against the parties, who have only obeyed the commands of the court. Clearly, their remedy, if they have any, is against the property in the hands of the receivers.

The 2d section of the Act of 1867, 14 Stat. at L., 885, which was in force when this writ of error was brought, and which has been substantially re-enacted in the Revised Statutes (sec. 709), differs only from the 25th section of the Judiciary Act of 1789, so far as the provision now under consideration is concerned, in the substitution of the word "immunity" for "exemption." In the old Act, the words were "title, right, privilege or exemption;" in the last, "title, right, privilege or immunity." This does not materially affect the rights of the parties in the present case. The words, when used in this connection and applied to the circumstances of this case, have substantially the same meaning.

The construction of this provision in the Act of 1789 came before this court for consideration as early as 1809, in the case of *Owings v. Norwood*, 5 Cranch, 344. That was an action of ejectment in a state court. The defendant, being in possession, set up an outstanding title in a third person under a treaty. The writ of error from this court was dismissed for want of jurisdiction. In the progress of the argument, *Ch. J. Marshall* used this language: "Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and decisions of the States; and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by a treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty. But neither the title of Scarth nor of any person claiming under him can be affected by the decision of this case." In *Montgomery v. Hernandez*, 12 Wheat., 129, a suit was brought in a state court by parties beneficially interested in a bond given to the United States by a marshal to secure the faithful performance of his official duties. The suit was in the names of the beneficiaries, and not in that of the United States for their use. It was insisted that there could be no recovery, because the action should have been prosecuted in the name of the United States; and this was assigned for error in this court. But it was said that "The plaintiff in error did not and could not claim any right, title, privilege or exemption by or under the marshal's bond, or any Act of Congress giving authority to sue the obligors for a breach of the condition," and that the court had no jurisdiction of the case on that ground. Again; See 1 Otto.

the same question was presented and elaborately argued in *Henderson v. Tenn.*, 10 How., 311, decided in 1850. That also was an action of ejectment in a state court, in which the defendant set up an outstanding title in a third person, under an Indian treaty; and there, too, the writ was dismissed. In delivering the opinion of the court, *Ch. J. Taney* said: "It is true, the title set up in this case was claimed under a treaty; but, to give jurisdiction to this court, the party must claim the right for himself, and not for a third person in whose title he has no interest. * * * The heirs of Miller appear to have no interest in this suit, nor can their rights be affected by the decision. The judgment in this case is no obstacle to their assertion of their title in another suit brought by themselves or any person claiming a legal title under them." To the same effect are *Hale v. Gaines*, 22 How., 149, 160 [63 U. S., XVI., 264, 269], and *Vorden v. Coleman*, 1 Black, 472 [66 U. S., XVII., 161]. This must be considered as settling the law in this class of cases; and it seems to be decisive of this case. The plaintiffs in error claim no title, right, privilege or immunity under the Bankrupt Law. Their obligation to account for the coupons in their hands is not discharged by the law. The title of the assignees cannot be affected by the decree, except through their consent. *It follows, therefore, that this case must be dismissed for want of jurisdiction.*

Cited—106 U. S., 544.

HENRY N. FARWELL

JAMES W. CONVERSE AND OTHERS,
Receivers, etc.

No. 81.

Error to the Supreme Judicial Court of the State of Massachusetts. [Argued at same time and by same counsel as preceding.]

Mr. Chief Justice Waite delivered the opinion of the court:

This case only differs from that of *Long and Watson* against the same parties, just decided, in the fact that in this, the decree against Farwell was for the delivery of the coupons which still remained in his hands, and not for the payment of the money collected upon them. *The writ in this case is, therefore, dismissed for the reason appearing in the opinion which has just been read.*

JABEZ A. SAWYER AND LYMAN B. FRAZIER, *Appts.*,

EDWARD TURPIN, AUGUSTUS HENRY NOVELLI, FRANCIS KOENIG AND HARDY BOWKER.

(See S. C., 1 Otto, 114-121.)

Preference under Bankrupt Act—exchange of securities.

1. Giving a mortgage in lieu of a previous bill of sale on the same property, given to secure the same debt, is a mere exchange in the form of the security and is not a new preference under the Bankrupt Act.

2. An exchange of securities within four months

before bankrupt proceedings, is not a fraudulent preference within the meaning of the Bankrupt Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be, undoubtedly, of equal value with the security substituted for it.

[No. 41.]

Argued Nov. 11, 1875. Decided Nov. 29, 1875.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

This was a bill in equity, filed in the District Court of the United States for the District of Massachusetts, by the appellants, the assignees of Jeremiah C. Bacheller, of Lynn, a bankrupt, to set aside certain mortgages to Edward Turpin, one of the defendants and appellees, upon real estate on Atlantic St., on Bacheller St. and on a frame building, all in Lynn. Turpin was the agent of the other appellees, who constituted a firm known as Novelli & Co., in England. It appeared that Bacheller had no title to the Bacheller St. property when he executed the mortgage to Turpin and, therefore, that property need not be considered as involved in the case. Pending the action in the district court, the real estate on Atlantic St. and the frame building were ordered to be sold by the assignees under agreement of parties, the assignees to hold the proceeds to await the result of the action.

The district court entered a decree to the effect that the complainants (the assignees) should hold, as assets of the bankrupt, the proceeds of the sale of the real estate on Atlantic St., and pay to the respondents, Novelli & Co., the proceeds of the sale of the frame building.

The complainants appealed to the circuit court, where the decree of the district court was affirmed. The complainants then appealed to this court. The defendants took no appeal, and the real estate need be no further considered.

The petition on which Bacheller was declared a bankrupt was filed Oct. 22, 1869. The mortgage by Bacheller to Turpin was dated July 21, 1869, and was recorded Sep. 17, 1869. Bacheller was largely indebted to Novelli & Co., and this mortgage was given to secure that debt; Turpin acting merely as the agent of Novelli & Co. Previously, May 15, the same year, Bacheller had given Turpin a bill of sale, absolute in form, of this same building, which was erected on leased land. The mortgage of July 31 was a substitute for this bill of sale.

The case is further stated by the court.

Messrs. J. G. Abbott and Benjamin Dean, for appellants.

Mr. Joshua D. Ball, for appellees.

Mr. Justice Strong delivered the opinion of the court:

The only question presented by this appeal is, whether the mortgage given by the bankrupt on the 31st day of July, 1869, to Edward Turpin, the agent of Novelli & Co., was a fraudulent preference of creditors within the prohibition of the Bankrupt Act and, therefore, void as against the assignees in bankruptcy. That it was a security given for the protection of a pre-existing debt, and that it was given within four months immediately preceding the filing of the petition in bankruptcy, are conceded facts. It may also be admitted that the bank-

rupt was insolvent when the mortgage was made, and that the creditors had then reason to believe he was insolvent.

The petition in bankruptcy was filed on the 22d of October, 1869. On the 15th of May next preceding that date, Bacheller, the bankrupt, who was indebted to Novelli & Co. in the large sum of \$27,839 in gold, conveyed to Turpin, who was their agent, as a security for the debt, the building described in the subsequent mortgage of July 31. It was a frame building, erected upon leased ground; and Bacheller had, therefore, only a chattel interest in it. The conveyance was by a bill of sale, absolute in its terms, having no condition or defeasance expressed; but it was understood by the parties to be a security for the debt due. It was, in substantial legal effect, though not in form, a mortgage. Having been executed more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid. True, it was not recorded; and it may be doubted whether it was admissible to record. True, no possession was taken under it by the vendee; but for neither of these reasons was it the less operative between the parties. It might not have been a protection against attaching creditors, if there had been any; but there were none. It was in the power of Turpin to put it on record any day, if the Recording Acts apply to such an instrument; and equally within his power to take possession of the property at any time before other rights against it had accrued. These powers were conferred by the instrument itself, immediately on its execution. In regard to chattel mortgages, the recording statutes of Massachusetts, enacted in 1836, provide as follows: "No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides." Rev. Stat., 478, ch. 74. The statute contains a clear recognition of the validity of an unrecorded chattel mortgage as between the parties to it, though no possession be taken under it. And the General Statutes of the State, enacted in 1860, p. 769, ch. 151, contain the same recognition. Their language is the following: "Mortgages of personal property shall be recorded on the records of the town where the mortgagor resides when the mortgage is made, and on the records of the city or town in which he then principally transacts his business or follows his trade or calling. If the mortgagor resides without the State, his mortgage of personal property within the State when the mortgage is made shall be recorded on the records of the city or town where the property then is. Unless a mortgage is so recorded, or the property mortgaged is delivered to and retained by the mortgagee, it shall not be valid against any person other than the parties thereto, except as provided in the following section." The exception extends only to mortgage contracts of bottomry or *respondentia*, to transfers, assignments or hypothecations of ships or vessels, and to transfers in mortgage of goods at sea or abroad. Neither of these Acts prescribes when the record must be made or the possession be taken; but, when made, the

instrument takes effect as against third persons as well as between the parties, from the time of its execution, unless intervening rights have been obtained. In *Mitchell v. Black*, 6 Gray, 100, it was ruled by the Supreme Court of Massachusetts that one who had taken bills of sale of merchandise from his debtor as a security for money advanced, and who had allowed the debtor to sell portions of the merchandise, in the usual course of his business, as if he were the owner thereof, might take possession of it at any time in order to secure his debt; and that such taking of possession, though at a time when the debtor was known by himself and the creditor to be insolvent, was effectual, notwithstanding the State Insolvent Law, which contained provisions very like those of the Bankrupt Act. The court held unqualifiedly that the bills of sale, absolute as they were in terms, though in fact intended only as a security, and though unattended by possession of the property, and though not placed upon record, vested a complete title in the creditor, subject only to be defeated by the discharge of the debt or by some intervening right acquired before the possession was taken. This was a case of bills of sale, like the present, not a case of a technical mortgage. In speaking of the registration of mortgages, the court said: "The time when the record shall be made is not specifically prescribed by the statute, though it must undoubtedly precede the possession by others subsequently acquiring an interest in the mortgaged property. To prevent it from passing to them, it will be sufficient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage."

It should not be doubted, then, that the bill of sale of May 15, 1869, conveyed to Turpin all Bacheller's interest in the frame building; that it was effective for the purposes for which it was made; and, no other rights having intervened, that it was a valid security to the extent of the value of the property, for the debt due Novelli & Co. on the 31st of July, 1869, when the mortgage impeached by the bill was made. The mortgage covered the same property. It embraced nothing more. It withdrew nothing from the control of the bankrupt or from the reach of the bankrupt's creditors that had not been withdrawn by the bill of sale. Giving the mortgage in lieu of the bill of sale, as was done, was, therefore, a mere exchange in the form of the security. In no sense can it be regarded as a new preference. The preference, if any, was obtained on the 15th of May, when the bill of sale was given, more than four months before the petition in bankruptcy was filed. It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankrupt Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it. This was early decided with reference to the Massachusetts insolvent laws: *Stevens v. Blanchard*, 8 Cush., 169; and the same thing has been determined with reference to the Bankrupt Act, 14 Stat. at L., 515. (*Cook v. Telle*, 18 Wall., 840 [85 U. S., XXI., See 1 Otto.

987]; *Clark v. Iselin*, 21 Wall., 360 [88 U. S., XXII., 568]; *Watson v. Taylor*, 21 Wall., 378 [88 U. S., XXII., 576]; and *Burnhisel v. Firman*, not yet reported [89 U. S., XXII., 766]. The reason is that the exchange takes nothing away from the other creditors. It is, therefore, not in conflict with the 85th section of the Act, the purpose of which is to secure a ratable distribution of the property of a bankrupt owned by him at the time of his becoming bankrupt, and undiminished by any fraudulent preferences given within four months prior thereto.

It follows that the mortgage of July 31 was not prohibited by the Bankrupt Act when it was given, and that it was valid. Hence, as it was recorded on the 17th day of September, 1869, pursuant to the requisitions of the state law, before any rights of the assignees in bankruptcy accrued, it cannot be impeached by them.

It has been argued, however, on behalf of the assignees, that the bill of sale of May 15 was an insufficient consideration for the mortgage, because, as alleged, there was an agreement between Bacheller and Turpin that it should not be recorded and should be kept secret. If the fact were as alleged, it is not perceived that it would be of any importance; for it is undeniable that the bill of sale rested on a valuable consideration—to wit: the debt of \$27,839 in gold, due to Novelli & Co.; and it is not denied that it gave to Turpin the right to take possession of the property described in it. It was, therefore, a valuable security, even if there was an agreement not to record it. If it be said failure to put it on record enabled the debtor to maintain a credit which he ought not to have enjoyed, the answer is that the Bankrupt Act was not intended to prevent false credits. Its purpose is ratable distribution. But the evidence does not justify the assertion that there was in fact any agreement that the bill of sale should not be recorded or that possession should not be taken under it.

Upon all points, therefore, the case is with the appellees, and the decree of the Circuit Court must be affirmed.

Cited—101 U. S., 743; 15 Bk. Reg., 188, 440; 16 Bk. Reg., 30, 210; 17 Bk. Reg., 299; 4 Dill., 125, 135; 5 Dill., 121; 1 Hughes, 201; 1 McCrary, 447; 30 Ohio St., 527, 530, 532.

JAY COOKE, WILLIAM J. MOREHEAD,
H. D. COOKE, H. C. FAHNESTOCK,
EDWARD DODGE AND PITT COOKE, as
JAY COOKE & COMPANY, *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C., 1 Otto, 389-405.)

*United States, as party to commercial paper—
payment of forged paper—effect of—payment
of treasury notes.*

1. When the United States becomes a party to commercial paper, it incurs all the responsibilities of a private person under the same circumstances.

NOTE.—Payment in forged or depreciated paper, effect of, by drawer or acceptor of forged bill. See note to Bank of U. S. v. Bank of Georgia, 23 U. S. (10 Wheat.), 333.

2. Where one accepts forged paper, purporting to be his own, and pays it to a holder for value, he cannot recall the payment.

3. When a party is entitled to an examination of accounts for the purposes of verification of the paper, he cannot be held to have accepted it until this examination ought to have been completed. Or, if the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the character of the instrument.

4. Payment by the Assistant Treasurer for treasury notes for redemption, did not retire the notes, and if they were forged, did not throw the loss on the Government, or preclude recovering back the money paid until after a reasonable time for examination and acceptance at the Treasury Department had occurred.

5. If the notes were not counterfeit, but genuine notes, unlawfully and surreptitiously put in circulation, the Government was bound for their payment to a *bona fide* holder.

[No. 275.]

Argued Oct. 12, 1875. Decided Nov. 29, 1875.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The following statement, fuller than that of the court here, is taken from the opinion of the circuit court. The full opinion, by Woodruff, J., may be found in 12 Blatchf., 48.

Mar. 8, 1865, Congress authorized the Secretary of the Treasury to borrow, on the credit of the United States, not exceeding \$600,000,000, and to issue therefor bonds or treasury notes of the United States, bearing interest not exceeding 7½ per cent. per annum, payable semi-annually. 13 Stat. at L., 468. Such notes were not made a legal tender. Under this Act, treasury notes to a large amount were issued by the Secretary of the Treasury, payable three years after date.

Aug. 12, 1866, Congress by another Act, authorized the Secretary of the Treasury, at his discretion, to receive any treasury notes or other obligations issued under any Act of Congress, whether bearing interest or not, in exchange for any description of bonds authorized by the previous Act of Mar. 8, 1865, and also to dispose of any description of bonds authorized by such previous Acts, for lawful money of the United States, or for any treasury notes * * * which have been, or which may be, issued under an Act of Congress, the proceeds thereof to be used only for retiring treasury notes or other obligations issued under any Act of Congress; but nothing herein contained shall be construed to authorize any increase of the public debt. 14 Stat. at L., 81.

On each of several days, from and including Sep. 20 and Oct. 8, 1867, the defendants, the plaintiffs in error, presented to the Assistant Treasurer of the United States at the City of New York, large amounts of treasury notes purporting to be issued under the Act of 1865, dated June 15, 1865, and payable three years after date and, in the language of the then Assistant Treasurer, examined as a witness in this case: "He purchased the amounts and description of notes at the prices and premium mentioned," in bills of sale therefor, made by the defendants (plaintiffs in error), which, together with the notes which they purported to include, were purchased and paid for with the money of the United States by such Assistant Treasurer, and at a premium above the face thereof, shown by

the said bills of sale. Such bills of sale were in the following form:

Sold Hon. H. H. Van Dyck, Assistant Treasurer of the United States, No. 700, by Jay Cooke & Co., Corner of Wall and Nassau Streets, Sep. 20,

\$400,000, June, 7½,	107.....	\$428,000
	97 days	7,760
\$100,000, July, 7½,	107	107,000
	67 days.....	1,340

\$544,100

Upon the back of the treasury notes the defendants, by a stamp which, for their convenience, they were permitted to employ in lieu of their written signature, before such delivery, printed on the back of each, the words: "Pay to the Secretary of the Treasury for redemption, Jay Cooke & Co."

By the form of the transactions, therefore, the defendants (plaintiffs in error) proposed to sell the several notes and, by indorsement, to authorize the Secretary of the Treasury to receive them for redemption at the Treasury.

This appears to have been the mode which, in these cases at least, the Secretary adopted for retiring treasury notes under the Act of 1866, before mentioned.

The notes thus received from the defendants were forwarded by the Assistant Treasurer to the Secretary of the Treasury at Washington, and, on examination there, eighteen thereof, of \$1,000 each, were pronounced not to be genuine treasury notes, issued by the Government of the United States, and were thereupon returned to the Assistant Treasurer at New York, who, Oct. 13, 1867, notified the defendants that they were counterfeit, and required them to refund the money paid for them or substitute other notes for them. The defendants below, neglecting or refusing to do either, this action was brought in the district court on or prior to Mar. 4, 1868, to recover back the money, and on the trial hereof, the United States had a verdict for the amount paid to the defendants for such eighteen notes, with interest thereon, \$28,630.88. Judgment being entered, the defendants below have brought this writ of error to review decisions made on the trial and portions of the charge of the judge to the jury, which appear in the bill of exceptions made for that purpose.

The declaration herein contained special counts describing the cause of action as an indebtedness by the defendants to the plaintiff for money had and received by the defendants to and for the use of the United States, and of its property, which money was obtained by the defendants upon occasion of their delivering to the plaintiff of what purported to be obligations of the United States known as 7-30 treasury notes, which were by the defendants, when they delivered them to the officer of the sub-treasury, professed to be, and by the plaintiff and its officer aforesaid, were then supposed to be, valid, genuine notes, and by the defendants' representations and inducements the same were received as valid, genuine notes by the plaintiff, and its officer aforesaid, at the sub-treasury of the United States aforesaid, at the City of New York.

That the said notes were, in fact, counterfeit, and had never been executed or issued by the United States of America, their officers or agents,

but had been forged and falsely made and uttered, and were no obligations of the United States aforesaid, and were by its officers aforesaid received as aforesaid under the belief created by the representations and inducements aforesaid, that the notes were good and formed a valuable and adequate consideration for the money received by the defendants, which money was retained by the defendants from the plaintiff, after discovery that the said notes were counterfeit, whereof prompt notice was given to the defendants. That being so indebted, the defendants promised, etc. Other counts were also contained in the declaration in general *indebitatus assumpsit*, for money had and received by the defendants to and for the use of the plaintiff.

To the declaration the defendants pleaded *non assumpsit* only.

The proofs on the trial were mainly addressed to the inquiries whether the notes in question were a part of the regular series of notes printed at the Treasury of the United States under the said Act of 1865, and issued by the Secretary of the Treasury, and whether the said notes were wholly spurious and counterfeit, not made nor printed upon any plates made or engraved at the Treasury; and, further, whether the said notes were surreptitiously and fraudulently printed from the plates and dies in the Treasury Department, or being in fact lawfully printed, were fraudulently, by some means not disclosed, put in circulation as treasury notes.

On these last named questions there was no evidence whatever of such fraudulent or surreptitious printing or of such fraudulent putting in circulation of notes lawfully printed, except so far as the evidence, introduced on the part of the defendants to show that these notes might have been printed from the lawfully made plates at the Treasury, in connection with the evidence that the said notes were not a part of the series of treasury notes lawfully issued by the Secretary of the Treasury, might create a suspicion that the government plates were used by some one and by some means to make the notes in question.

The evidence that the notes were not printed from the government plates, but were wholly counterfeit and spurious, was very strong, and the conflict of evidence was so slight that, had the case gone to the jury upon that sole question, it seems hardly possible that the jury could have hesitated to find them wholly false, forged and counterfeit. Indeed, I think a finding that they were printed from the government plates, and were sealed with the genuine seal of the Treasury, would have been so against the weight of the evidence, that it must have been set aside, if the jury had rendered such a verdict.

But, as will be hereinafter more fully stated, the case did not go to the jury on that sole question, as the test of the right to recover, but on the question whether the notes in controversy were, in fact, issued by the Secretary of the Treasury; the question, whether or not they were printed from the government plates and actually sealed with the treasury seal, being regarded by the court as material only from its incidental bearing on the question whether they were, in fact, issued by the Secretary of the Treasury.

A distinction is, therefore, raised between notes
See 1 O'Kee.

which, being printed from the government plates and sealed with the seal of the Treasury as evidence of lawful issue, were never in fact issued by the Secretary of the Treasury, but by some surreptitious and unlawful means may have been thrown into negotiation or circulation, and, on the other hand, notes which the Secretary of the Treasury actually issued from his department of the Government.

Notwithstanding the dearth of evidence tending to show any surreptitious or clandestine use of the government plates, or of any fraudulent abstraction of notes printed therefrom, the theory which governed the trial requires that such a possibility be contemplated in reviewing the rulings of the judge and his charge to the jury.

* * * * *

All the notes issued by the Secretary of the Treasury, of the description in form and date, corresponding with those now in question, called for convenience 7-30 treasury notes, were printed from engraved plates, with the engraved signatures of the Treasurer of the United States and the Register of the Treasury; were lettered and numbered by a machine; and were stamped with the seal of the Treasury Department. No writing whatever appeared thereon, either of names, numbers or words of any kind. They were made and issued in series; each series being designated, and the notes in each series distinguished by the numbers or letters printed thereon. Those which were produced by the plaintiff as genuine notes, which had been issued by the Secretary of the Treasury and put in evidence in this case, like those sold by the defendants and subject to this controversy, were dated June 15, 1865, payable three years after date, i. e., June 15, 1868, and were, therefore, not due at the time when the notes in question were sold by the defendants, nor when this action was brought to recover back the money paid for the said last-named notes.

Numerous questions, touching the admissibility of evidence, were raised in the progress of the trial. Most of them related to the question, whether the notes in question were printed from government plates in the Treasury Department. This inquiry was deemed proper because, if they were so printed, then some presumption would arise that they were issued by the Government.

Some of them related to the proof of the notes, which were, in fact, issued in due course, and the books and papers of the Department, showing to whom issued and when, and what were their numbers, etc., as tending to show what notes, and what only, were issued by the Government. Some related to other particulars.

It must suffice, without taking up and discussing each exception in detail, that I am of opinion that if the principle of liability governing the trial was correct, then no error was committed in these rulings.

A large range of speculative inquiry was urged by the defendants into possible and conjectural modes of accounting for the differences between the alleged counterfeit notes and those which were testified to be genuine, and I think the defendants were allowed quite as much latitude as they were entitled to.

II. It is manifest that, upon the merits of the controversy, the statutes and the facts above detailed suggest several interesting ques-

tions which were raised on the trial, and were discussed in this court on the writ of error.

1. The notes in question having been, in fact, purchased from the defendants by the Assistant Treasurer at New York, is the Government concluded? Or are the questions, whether the notes so purchased are forged and counterfeit, and whether they were, in fact, ever issued under the Acts of Congress, open to inquiry and proof?

2. The question of fact: are the notes in question forged and counterfeit?

3. If not forged and counterfeit, then the question of fact: were they issued under any Act of Congress?

4. If not so issued in fact, are they obligations of the Government, which, by law, the Government is bound to pay, if they were either printed from the government plates surreptitiously or unlawfully used for the purpose, or were unlawfully and surreptitiously abstracted, without any authority of the officers of the Government, and were negotiated so that they came to the hands of the defendants as *bona fide* holders, for value, without notice?

5. Had the Secretary of the Treasury or, more definitely, had the Assistant Treasurer at New York, any authority to purchase the notes in question, for the purpose of having them retired, if they were not notes which had been, in fact, issued by the authority of Acts of Congress, even though they were printed from the government plates, and came to the hands of the defendants for value paid, *bona fide* and without notice, and in such wise, as, upon the principles of commercial law, to create an obligation on the part of the Government to pay them when they should become due?

Messa John E. Burrill, R. L. Ashurst and John C. Bullitt, for plaintiffs in error:

The court erred in refusing to charge the jury that if Jay Conke & Co. believed the notes to be genuine obligations, and so believing, in good faith passed them to Van Dyck, the Assistant Treasurer, and the latter in like belief, received and paid for them, the plaintiffs are not entitled to recover.

The circuit court places its opinion adverse to our proposition, on two grounds:

1. That in this case the transaction was a purchase of securities by the Government, and not the payment of a debt or the redemption of an obligation, and,

2. Even if it were the latter, the authority of the Assistant Treasurer was restricted to the redemption of genuine obligations, and that the Government was not responsible for any default or neglect of duty on his part.

In the first place, the transaction was not a purchase of securities by the United States, but was the redemption of its obligations. It is true that the notes were not due and payable until three years after their date; but they were, by their terms, at their maturity convertible, at the option of the holder, into 5 20 bonds. The Act of Apr. 12, 1865, 14 Stat. at L., 31, which extended the application of the Statute of Mar. 3, 1862, provided in substance that the securities, issued under the last mentioned Act might be paid, and the proceeds used for retiring treasury notes or other obligations issued under any Act of Congress. The intention of the Government, therefore, was to retire, or in

other words, to redeem the treasury notes before they became due by their terms.

But even if the transaction could, on any principle, be deemed a purchase, for any purpose, we insist that the rule which would apply to the purchase of an obligation made by or a debt due from a third party, has no application, when the obligation or debt is that of the party himself.

These notes in question were surrendered to the officer selected by the United States to receive and pay for them, and on such surrender were mutilated by the cancellation or passing out of the signature on the face of the notes, and otherwise defaced. And the Government not only has not returned the notes, but by its own acts has rendered itself unable to return and restore these obligations to us.

It has deprived us of the right of making reclamation upon the parties upon whom the notes, if they pass through our hands, were received.

The rule is, that the party to whom forged or counterfeit obligations are passed, must notify the party from whom they were received, immediately, and must tender to him the instruments themselves.

In this case no notification was given to the defendants until three weeks after the notes were received, and the notes themselves had been defaced and mutilated.

Thomas v. Todd, 6 Hill, 340; *Kenny v. 1st Nat. Bk.*, 50 Barb., 114; *Bk. of Commerce v. Union Bk.*, 3 N. Y., 230; 2 Para. Cont., 265; 3 Para. Cont., Notes; compare, also, *Posley v. Brown*, 103 Eng. C. L., 566; *Rick v. Kelly*, 30 Pa., 529; *Raymond v. Baar*, 13 Serg. & R., 319; *Price v. Neale*, 3 Burr., 1355; *Levy v. Bk.*, 1 Bin., 27; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287; *Bk. of Com. v. Union Bk.*, 3 N. Y., 230; *Jones v. Ryde*, 5 Taunt., 488; *Smith v. Chester*, 1 T. R., 654; *Smith v. Mercer*, 6 Taunt., 76; *Farm. & Mech. Bk. v. Butch. & Drov. Bk.*, 14 N. Y., 623; *Lynde v. The County*, 16 Wall., 13 (83 U. S., XXI., 274); *St. Joseph Township v. Rogers*, 16 Wall., 665 (83 U. S., XXI., 338); *Allen v. Blunt*, 3 Story, 743.

The rules that payment made in forged notes may be treated as a nullity, and that the amount may under certain circumstances be recovered, and that there is an implied warranty of the genuineness of the instruments transferred, have no application where the notes or instruments claimed to be forged or not genuine, purport to be obligations of the party receiving them, because there is a legal obligation resting upon such party to know his own obligations, and the receipt is deemed an adoption of them.

Price v. Neale, 3 Burr., 1354; *Bk. of U. S. v. Bk. of Ga.*, 10 Wheat., 843, and cases cited above; *Levy v. Bk.*, 4 Dall., 284; *Gloucester Bk. v. Salem Bk.*, 17 Mass., 41; *Nat. Park Bk. v. 9th Nat. Bk.*, 46 N. Y., 77, and cases cited; *Nat. Bk. of Com. v. Nat. Mech. Bkg. Assn.*, 55 N. Y., 213; *Weimer v. Denison*, 10 N. Y., 63; *Gross v. Am. Ex. Bk.*, 17 N. Y., 205; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287.

There is no reason why the Government should not, in its dealings and transactions with the citizen, be bound by the same rules and principles which are applicable to individuals when engaged in transactions of like character. There is nothing in the Act of Apr. 12, 1865,

under which the Secretary of the Treasury acted, which affects this question, unless it can be established that the Government is exempted from the application of the principle of the cases cited, because the law would imply exactly what is expressed in the statute, viz.: that the redemption or conversion must be limited to obligations for which the United States was liable, and the question is, whether the rule above referred to does apply.

This court has decided that the Government is bound to use the same diligence in order to charge the indorser of a bill of exchange as private individuals are, and it was defeated in an action to recover such a bill for neglect in giving due notice.

U. S. v. Barker, 12 Wheat., 559; *The Floyd Acceptances*, 7 Wall., 666 (74 U. S., XIX., 169); *U. S. v. Bk.*, 15 Pet., 377; *Martin v. Mott*, 12 Wheat., 19; see, also, *Allen v. Blunt*, 8 Story, 748; *Gould v. Hammond*, 1 McAll., 235; *Kendall v. Stokes*, 3 How., 87; *Douglas v. U. S.*, 2 Nott & H., 347; *Lester v. U. S.*, 1 Nott & H., 52; *Frémont's case*, 2 Nott & H., 461; *Brooke's case*, 2 Nott & H., 180; *Wiggins' case*, 3 Nott & H., 412.

The district court erred in ruling that the only notes which could be retired under the Act of Apr. 12, 1866, were those actually issued by the United States; that the act of issuing the notes was a physical one; and that the notes in question might have been printed from the genuine plates in the department, and might be all ready to issue; and yet if they were not in fact issued, they did not come within the statute, and defendants must fail.

This court has repeatedly held that government obligations, and especially 7-30 notes, have all the peculiarities and qualities of commercial paper, and are within the class of negotiable instruments, and that the rules of law applicable to the latter, apply to such government obligations.

Mercer Co. v. Hackett, 1 Wall., 88 (68 U. S., XVII., 548); *Murray v. Lardner*, 2 Wall., 110 (69 U. S., XVII., 857); *Thompson v. Lee Co.*, 3 Wall., 327 (70 U. S., XVIII., 177).

The liability upon such securities is the necessary result of the principles laid down in the leading case of *Miller v. Race*, 1 Burr., 452; 1 Smith. L. Cas., 597; and was directly decided in *Ingham v. Primrose*, 7 C. B. (N. S.), 82.

Referring the court to the opinion of the court below, and to the authorities there cited, I will only add that the case is much strengthened by the fact that, under the Acts authorizing the issue of these notes, the Treasurer of the United States was vested with increased powers; that he was authorized to borrow money on the credit of the United States, and that he was authorized to issue notes and bonds (sec. 1); that he was authorized to open subscription books, and to employ agents to aid in negotiating these securities; that the Assistant Treasurer, postmasters in different cities, and other persons became such agents.

Act, July 17, 1861, 12 Stat. at L., 259; see, also, the subsequent statutes of Feb. 25, 1862, 12 Stat. at L., 345; July 11, 1862, 12 Stat. at L., 523; Mar. 8, 1863, 12 Stat. at L., 709, and the later statutes of June 30, 1864, 13 Stat. at L., 214; Mar. 8, 1868, 13 Stat. at L., 468.

The circuit court, however, though evidently

of the opinion that the United States would have been liable to the defendants in this action at the maturity of the notes, and that the amount could then have been recovered, took the position that, under the Act of Apr. 12, 1866, the case was different; and that, although the United States was so liable, still, that the Act in question limited the authority of the Assistant Treasurer to the redemption of notes actually issued by the United States, and that the charge of the district court was, therefore, correct.

It seems to us clear that the object of the Act of Apr. 12, 1866, was to enable the United States to substitute 5-20 bonds for 7-30 notes or other obligations, and thereby to get the benefit of an extension of time and a diminished rate of interest; that the phrase, "issued under any Act of Congress," was not intended to create a distinction between those which were and those which were not so issued, but that these words were used so as not to confine the redemption to treasury notes, but to extend it to all other obligations of the United States; that there was no intention to make any such discrimination; that these terms embrace all instruments purporting to be and which are in effect 7-30 notes or other obligations for or in respect to which the United States is liable, and that if the United States was liable on these instruments in question, then that they were within the purview of the Act, and that, under the circumstances, such instruments were, in fact, issued by the United States.

Messrs. Edwards Pierrepont, Atty-Gen., and *S. F. Phillips, Solicitor-Gen.*, for defendant in error:

We admit that when the United States engages in commercial business, it does so in general submission to the principles of law which, in such business, apply to private persons.

But the transaction, viz.: anticipated payment, out of which the present action sprang, was not of a commercial but of an administrative character. Although the paper acted upon was commercial paper, the act itself was collateral both to the terms and the consideration of the original contract.

The exceptional principles of law to which, in issuing commercial paper, the United States submits itself are those which have been devised to impart and sustain the exceptional credit and currency of such paper while in circulation. If, in any transaction, it be sought to create an exception to the ordinary privileges of the United States, as regards laches, etc., it must be shown that the reason for the exception applies. The mere laches of paying forged paper cannot operate injuriously upon innocent persons, although laches in discovering or notifying such mistake may. In the former case, the rule of decision would come from such cases as *U. S. v. Kirkpatrick*, 9 Wheat., 735, and *Gibbons v. U. S.*, 8 Wall., 269 (75 U. S., XIX., 453); in the latter, perhaps, from *U. S. v. Barker*, 12 Wheat., 559.

The rules of commercial law which cover laches as to paper in circulation do not apply to a transaction which retires the paper. The cases cited by the plaintiffs, in which it has been held that the United States is bound by the laches of its agents as to commercial paper, are cases where the paper continued in circula-

tion after such laches; not where it thereby reached its supposed home.

The plaintiffs in error cite *Martin v. Mott*, 12 Wheat., 19, to show that the Act of 1866, in authorizing the Secretary to redeem treasury notes of a certain class, i. e., those issued as above, conferred upon him jurisdiction to decide without appeal whether a particular note tendered to him belonged to that class. It seems plain that the well established principle of *Martin v. Mott* cannot be applied so as to enable an agent and a third person who does business with him, practically to enlarge in the interest of the latter, the sphere of agency, defined by the principal, and previously declared to such third person. In the latter case the rule is laid down by this court in *The Floyd Acceptances*, 7 Wall., 676 (74 U. S., XIX., 173); the agency "May be a limited authority to draw or accept under given circumstances defined in the instrument which confers the power. But in either case, the person dealing with the agent, knowing that he acts by virtue of a delegated power, must, at his peril, see that the paper upon which he relies comes within the power under which the agent acts."

If the Assistant Treasurer had no authority to redeem the notes in question, his action can be ratified only by Congress, which body alone has authority to order payment of treasury notes to be anticipated; according to the rule laid down in *Marsh v. Fulton Co.*, 10 Wall., 676 (77 U. S., XIX., 1040).

The 2d, 3d, 4th and 5th assignments, as summed up in the brief for the plaintiffs, are, that the court erred in ruling that the only notes which could be retired under the Act of Apr. 12, 1866, were those actually issued by the United States.

Upon this assignment, as already said, we submit that a distinction exists between what the United States might be bound to do at the maturity of notes perfect upon their face, which have gotten into circulation irregularly, and what by the Act of 1866 it intended to do as to notes not yet matured. *Animus hominis est anima scripti*. It will hardly be supposed that Congress actually intended to redeem any paper not actually issued, and so long at least as such paper was immature, it was not bound to do so. The meaning given to "issue" in this connection by the court below is the same as that which it obviously bears in other connections in the same statute, and in the related statutes of 1865, ch. 77, 13 Stat. at L., 468.

Mr. Chief Justice Waite delivered the opinion of the court:

The United States sued Jay Cooke & Co., in this action, to recover back money paid them by the Assistant Treasurer in New York for the purchase or redemption before maturity, under the Act of Aug. 12, 1866, 14 Stat. at L., 81, of what purported to be eighteen 7-80 treasury notes, issued under the authority of the Act of March 3, 1865, 13 Stat. at L., 468, but which, it is alleged, were counterfeit. Cooke & Co. insist, that if they honestly believed the notes in question were genuine and, so believing, in good faith passed them to the Assistant Treasurer, and he, under a like belief and with like good faith, received and paid for them,

there can be no recovery, even though they may have been counterfeit.

As this defense meets us at the threshold of the case, it is proper that it should be first considered.

It was conceded in the argument, that, when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court. *The Floyd Acceptances*, 7 Wall., 666 [74 U. S., XIX., 169]; *U. S. v. Bk.*, 15 Pet., 377. As was well said in the last case, "From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be in maintaining these principles." It was also conceded that genuine treasury notes, like those now in question, were, before their maturity, part of the negotiable commercial paper of the country. We so held at the last Term, in *Vermilye v. Express Co.*, 21 Wall., 138 [88 U. S., XXII., 609].

It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper, accompanied by payment, is equivalent to an adoption within the meaning of the rule; because, as every man is presumed to know his own signature and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he ought to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay, under such circumstances, is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in *Gloucester Bk. v. Salem Bk.*, 17 Mass., 45: "The party receiving such notes must examine them as soon as he has opportunity, and return them immediately; if he does not, he is negligent; and negligence will defeat his action."

When, therefore, a party is entitled to something more than a mere inspection of the paper before he can be required to pass finally upon its character—as, for example, an examination of accounts or records kept by him for the purposes of verification—negligence sufficient to charge him with a loss cannot be claimed until this examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without it will have the effect of an acceptance and adoption. But if the presentation is made at a time when, or at a place where, such an examination cannot be had, time must be allowed for that purpose, and, if the money is then paid, the parties, the one in paying and the other in receiving payment, are to be understood as agreeing that a receipt and payment under such circumstances shall not amount to an adoption, but that further inquiry may be made and, if the paper is

found to be counterfeit, it may be returned within a reasonable time. What is reasonable must in every case depend upon circumstances; but, until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay.

So, too, if the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the character of the instrument. It is the negligence of the principal that binds; and that of the agent has no effect, except to the extent that it is chargeable to the principal.

Laches is not imputable to the Government, in its character as sovereign, by those subject to its dominion. *U. S. v. Kirkpatrick*, 9 Wheat., 785; *Gibbons v. U. S.*, 8 Wall., 269 [75 U. S., XIX., 458]. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and if fails in this, its claim upon the parties is lost. *U. S. v. Barker*, 12 Wheat., 559. Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted, or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world.

Such being the principles of law applicable to this part of the case, we now proceed to examine the facts.

The Department of the Treasury is by law located at the seat of government as one of the Executive Departments, and the Secretary of the Treasury is its official head. R. S., sec. 233; 1 Stat. at L., 65. All claims and demands against the Government are to be settled and adjusted in this department (R. S., sec. 236; 3 Stat. at L., 866), and the Treasurer of the United States is one of its officers. R. S., sec. 301; 1 Stat. at L., 65. His duty is to receive and keep the money of the United States, and disburse it upon warrants drawn by the Secretary of the Treasury, countersigned by either comptroller, and recorded by the register, and not otherwise. R. S., sec. 305; 1 Stat. at L., 65. The rooms provided in the treasury building at the seat of government for the use of the Treasurer are, by law, the Treasury of the United States. R. S., sec. 3591; 9 Stat. at L., 59. Assistant treasurers are authorized and have been appointed to serve at New York and other cities. R. S., sec. 3595; 9 Stat. at L., 60. The rooms assigned by law to be occupied by them are appropriated to their use and for the safe keeping of the public money deposited with

them. R. S., sec. 3598; 9 Stat. at L., 59. The assistant treasurers are to have the charge and care of the rooms, etc., assigned to them, and to perform the duties required of them relating to the receipt, safe-keeping and disbursement of the public money. R. S., sec. 3599; 9 Stat. at L., 59. All collectors and receivers of public money of every description within the City of New York are required, as often as may be directed by the Secretary of the Treasury, to pay over to the assistant treasurer in that city all public money collected by them or in their hands. R. S., sec. 3615; 9 Stat. at L., 61. The Treasurer of the United States, and all assistant treasurers, are required to keep all public money placed in their possession till the same is ordered by the proper department or officer of the government to be transferred or paid out, and when such orders are received, faithfully and promptly to comply with the same, and to perform all other duties as fiscal agents of the Government that may be imposed by any law or by any regulation of the Treasury Department made in conformity to law. R. S., sec. 3639; 9 Stat. at L., 60. All money paid into the Treasury of the United States is subject to the draft of the Treasurer; and, for the purpose of payment on the public account, the Treasurer is authorized to draw on any of the depositaries as he may think most conducive to the public interest and the convenience of the public creditors. R. S., sec. 3644; 9 Stat. at L., 61.

Thus it is seen that all claims against the United States are to be settled and adjusted "in the Treasury Department;" and that is located "at the seat of government." The Assistant Treasurer in New York is a custodian of the public money, which he may pay out or transfer upon the order of the proper department or officer; but he has no authority to settle and adjust, that is to say, to determine upon the validity of any claim against the Government. He can pay only after the adjustment has been made "in the Treasury Department," and then upon drafts drawn for that purpose by the Treasurer.

By the Act of April 12, 1866, the Secretary of the Treasury was authorized, at his discretion, to receive the treasury notes issued under any Act of Congress in exchange for certain bonds; or he might sell the bonds, and use the proceeds to retire the notes. 14 Stat. at L., 81. This exchange or retirement of the notes involved an adjustment of the claims made on their account against the Government. That adjustment, as has been seen, could only be had in the Treasury Department; and the Government cannot be bound by any payment made without it, through one of the assistant treasurers, until a sufficient time has elapsed, in the regular course of business, for the transmission of the notes to the department, and an examination and verification there.

That such was the expectation of Congress is apparent from the legislation authorizing the issue of such notes. On the 23d December, 1857, an Act was passed "to authorize the issue of treasury notes." 11 Stat. at L., 257. The payment or redemption of these notes was to be made to the lawful holders upon presentment at the Treasury. Sec. 2. The notes were to be prepared under the direction of the Secretary of the Treasury, and to be signed in behalf of

the United States by the Treasurer thereof, and countersigned by the register of the Treasury. Each of these officers was to keep, in books provided for that purpose, accurate accounts, showing the number, date, amount, etc., of each note signed or countersigned by himself, and also showing the notes received and canceled. These accounts were to be carefully preserved in the Treasury. Sec. 3. The notes were made receivable for public dues, Sec. 6. The officer receiving the same was required to take from the holder a receipt upon the back of each note, stating distinctly the date of payment and amount allowed. He was also required to make regular and specific entries of all notes received by him, showing the person from whom received, the number, date and the amount of principal and interest allowed on each note. These entries were to be delivered to the Treasurer with the notes; and, if found correct, he was to receive credit for the amount allowed. Sec. 7. To promote the public convenience and security, and protect the United States as well as individuals from fraud and loss, the Secretary of the Treasury was authorized to make and issue such instructions as he should deem best, to the officers required to receive the notes in behalf of, and as agents in any capacity for, the United States, as to the custody, disposal, canceling and return of the notes received, and as to the accounts and returns to be made to the Treasury Department of such receipts. Sec. 8. The Secretary of the Treasury was directed to cause such notes to be paid when they fell due, and he was authorized to purchase them at par for the amount of the principal and interest due at the time of the purchase. Sec. 9.

The Act of July 17, 1861, "to authorize a national loan, and for other purposes," provided for an issue of 7-80 treasury notes, and, in terms, re-enacted all the provisions of the Act of December 23, 1857, so far as the same were applicable and not inconsistent with what was then enacted. 12 Stat. at L., 259, secs. 1 and 10.

The Acts of June 30, 1864, 13 Stat. at L., 218, and March 8, 1865, 13 Stat. at L., 468, which authorized further issues of the same class of notes, did not in terms re-enact the provisions of the Acts of 1857 and 1861; but they did authorize and require the Secretary of the Treasury to make and issue such instructions to the officers who might receive the notes in behalf of the United States as he should deem best calculated "to promote the public convenience and security, and to protect the United States as well as individuals from fraud and loss." 13 Stat. at L., 221, sec. 8.

These are public laws of which all must take notice. In the absence of any evidence showing a regulation permitting an exchange or redemption of notes at any other place than the Treasury, and after settlement and adjustment in the department, it will not be presumed that one was made. The notes in question are not made payable at any particular place; consequently, they are in law payable at the Treasury, and this is at the seat of Government and in the Treasury Department. In this department the Secretary represents the Government. His acts and his omissions, within the line of his official duties, are the acts or omissions of the Government itself; and in all commercial transactions his official negligence will be deemed to be the

negligence of the Government. He is specially charged with the duty of retiring these treasury notes by exchange, payment or purchase; and he is the only agent authorized to act for the Government in that behalf. All who deal with the Government in respect to these notes are presumed to know his exclusive authority; for it is public law. Until such time, therefore, as he has acted, or in due course of business ought to have acted, there can have been no such laches as will charge the Government. He is presumed to act officially only in his department. His attention can only be demanded after the presentation of the notes at that place. It was there that the accounts and records of the issues and redemptions under the early laws were by statute required to be kept; and that is the appropriate place for keeping such similar records as the Secretary of the Treasury may by regulation prescribe, under the later laws, to protect against fraud and loss.

Such seems to have been the understanding of the parties in the transaction which is now under consideration. The notes were "sold" to the assistant treasurer, and were, by stamp upon their back at the appropriate place for their indorsement, made payable "to the order of the Secretary of the Treasury, for redemption." The payment by the assistant treasurer, under such circumstances, for the purchase, did not "retire" the notes. That, upon the face of the transaction required the further order of the Secretary of the Treasury. Undoubtedly it was expected that, in due course of business, that order would be given; but until given, or at least until it ought to have been given, it cannot be said that the Government has accepted the notes, and adopted them as genuine.

Neither has there been such delay in returning the notes to Cooke & Co., after their receipt by the assistant treasurer, as will throw the burden of the loss upon the Government. The return should have been made within a reasonable time; and what is a reasonable time is always a question for the courts when the facts are not disputed. *Wiggins v. Burkhart*, 10 Wall., 188 [77 U. S., XIX., 886]. Here there is no dispute. The notes were delivered to the assistant treasurer on different days between September 20 and October 8. The first suspicion in Washington in regard to their character was October 5, when a note was found, of which, upon inspection of the record, a duplicate was already in. All the notes were found and returned to New York October 12, and the next day Cooke & Co. were notified.

The amount of 7-80 notes issued by the Government was many hundreds of millions of dollars. Necessarily, the accounts and records of their issue and redemption were voluminous. Between September 20 and October 8, Cooke & Co. themselves sold to the Assistant Treasurer for redemption more than \$7,500,000. Other parties were at the same time making sales to large amounts. Time must be given for careful examination and scrutiny; and we do not think, that, under all the circumstances, any unreasonable delay occurred either in their transmission to or return from the Treasury Department.

We are all clearly of the opinion, therefore, that, if the notes were in fact counterfeit, their receipt by the Assistant Treasurer and his pay-

ment therefor did not preclude the United States from receiving back the money paid. So far, there was no error in the courts below.

It was, however, contended by Cooke & Co., that if the notes were not counterfeit, but genuine notes unlawfully and surreptitiously put in circulation, the Government was bound for their payment to a *bona fide* holder and, consequently, that there could be no recovery. We quite agree with the lamented judge of the circuit court who had this case before him upon error to the district court, that the evidence tending to show a fraudulent or surreptitious issue of notes printed from the genuine plates was exceedingly meager, and by no means sufficient to warrant a verdict to that effect; but the jury was not permitted to pass upon that question, as the district judge charged that if the notes were printed in the department, and all ready for issue, yet, if they were not in fact issued, the United States could recover. The issue to bind the Government," said the judge, "must be a physical act of an authorized officer."

It was conceded on behalf of the government, in the argument here, that, if the notes had been due when they were received and paid, this part of the charge could not be sustained. We need not, therefore, examine that question. The notes were perfect and complete as soon as printed. They did not require the signature of any officer. As soon as they had received the impression of all the plates and dies necessary to perfect their form, they were ready for circulation and use. In this respect they did not differ from the coins of the mint when fully stamped and prepared for issue. Coin is the money of commerce, and circulates from hand to hand as such. These notes represent the promises of the Government to pay money, and were intended to circulate and take the place of money, to some extent, for commercial purposes. Although not made legal tender as between individuals, they were, for their then face value, exclusive of interest, as between the Government and its creditors. 13 Stat. at L., 221, sec. 8. They were issued under the authority of "An Act to Provide Ways and Means for the Support of the Government," 13 Stat. at L., 218, title, in its great peril, and they bore the "imprint of the seal of the Treasury Department as further evidence of lawful issue." 13 Stat. at L., 220, sec. 6. Their aggregate amount was very large: and they were of all convenient denominations, not less than ten dollars. 13 Stat. at L., 218, sec. 2. The people were appealed to, through their patriotism, to accept and give them circulation. They entered largely, and at once, into the commerce of the country, and passed readily from hand to hand as, or in lieu of, money. After the close of the war, they became, in a sense, too valuable for circulation, and were on that account, to a large extent, withdrawn, and held for investment.

But it is insisted on the part of the Government, that as the Act of April 12, 1866, 14 Stat. at L. 81, only authorized the Secretary of the Treasury to retire, before their maturity, notes "issued" under the authority of some Act of Congress, he could only take up such as were actually put out by the "physical act" of some authorized officer of the Government in

pursuance of law. This, we think, is too narrow a construction of the Act. At the time it was passed, the war of the rebellion was over. In the prosecution of this war, an immense debt had been contracted. To meet the pressing demands upon the credit of the Government, various forms of securities had been put forth, some of which, like those now under consideration, would mature at an early date, and sooner, perhaps, than they could be met without the negotiation of new loans. In view of this possible contingency, Congress seems to have been desirous of meeting its obligations of this class, whenever they could be exchanged for or retired with the proceeds of the sale of certain specified bonds having a longer time to run. The object, evidently, was, to get rid of these species of debt; and we think the Act may be fairly construed to authorize the retirement of all notes of this class outstanding which the Government would be required to meet at maturity.

This leads to a reversal of the judgment. There have been other errors assigned upon the rulings made in the progress of the trial as to the admission of evidence. These need not be specially alluded to. It is sufficient to say that we think there is no error here. The same may be said as to the ruling of the court upon the punching or cancellation of the notes. If they were counterfeit, the cancellation could do no harm; for they were worthless before. If they were genuine, they had already been canceled by the payment.

The judgment of the Circuit Court is reversed and the cause remanded, with instructions to reverse the judgment of the District Court and to award a venire de novo.

Mr. Justice Clifford, dissenting:

I dissent from the opinion of the court in this case:

1. Because I am of the opinion that the United States are not liable for forged paper under any circumstances.

2. Because I am of the opinion that the United States is not liable for its paper promises fraudulently or surreptitiously put into circulation, even if the fraudulent act was perpetrated by treasury officials.

Mr. Justice Field and **Mr. Justice Bradley** concur in this dissent.

Mr. Justice Miller did not sit on the argument of this cause, and took no part in the decision.

WILLIAM H. SCUDDER, *Plff. in Err.*,
v.
THE UNION NATIONAL BANK OF CHICAGO.

(See S. C., 1 Otto. 406-414.)

Lex loci contractus—lex fori—parol promise to accept bill.

1. Matters bearing upon the execution, the interpretation and the validity of a contract, are determined by the law of the place where the contract is made; matters connected with its perform-

ances are regulated by the law prevailing at the place of performance.

2. A parol acceptance and a parol promise to accept a bill of exchange are valid in Illinois; and one who there promises another, either in writing or by parol, that he will accept a particular bill of exchange, and thereby induces him to advance his money upon such bill in reliance upon his promise, will be held to make good his promise.

[No. 88.]

Argued Nov. 5, 8, 1875. Decided Nov. 29, 1875.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of *assumpsit*, brought in the court below by the defendant in error against Scudder, the plaintiff in error, and other persons composing the firm of Henry Ames & Co., of St. Louis, Mo. Scudder, who was the only defendant served with process, filed a motion to set aside service, on the ground that he was served while attending the taking of depositions in the case between the same parties, and that improper means were used to bring him within the jurisdiction of the court. This motion was overruled. The declaration of the plaintiff contains three counts. In the view of the case taken by this court, it is unnecessary to set out the pleadings at length. The basis of the action, as alleged, was a parol promise made by Scudder, that the defendants would accept a certain bill of exchange drawn by Leland & Harbach, of Chicago, where the transaction took place, to the order of plaintiff. The transaction is fully stated in the opinion.

The court charged the jury, among other things, as follows:

"If you find from the evidence that Mr. Scudder, one of the defendants, authorized the drawing of the draft in question, and authorized the clerk, George H. Harbach, to so state to the Vice-President of the Bank, and that the said draft was discounted by the Bank upon the face of such statement, such conduct upon the part of Mr. Scudder may be considered by you as evidence of an implied promise by the defendants to pay the draft; and it is not necessary for that purpose that Mr. Scudder should have expressly sent word to the Bank, if such statements were made in his hearing and presence, and no objections made to them by him, that is to say, if he stood by and allowed either Leland or Harbach to send such word to the Bank without dissenting therefrom. If you find, by a fair preponderance of the testimony, that Mr. Scudder knew the draft had been delivered to Leland & Harbach at the time the draft was drawn, and acquiesced in the drawing of the draft, and acquiesced in the word sent to the Bank that he had authorized it, you may from such facts find an implied promise by the defendants to pay the draft. It was not necessary that Scudder should go to the Bank and state that he had authorized the draft, if you are satisfied that he allowed such statements to be made by the messenger."

"It being an admitted fact that the defendants have the proceeds of the draft against which this draft was drawn, such fact may also be

considered by you as an additional circumstance tending to show a promise on the part of the defendants to pay the draft."

"The real issue in this case is, whether Mr. Scudder authorized the drawing of the draft in question, and expressly or impliedly promised to pay it."

Mr. John H. Thompson, for plaintiff in error:

The 4th, 5th, 6th and 7th pleas are similar.

The counts of the declaration to which they were pleaded set up an acceptance and a promise of acceptance by the defendants, of a certain bill of exchange, drawn on defendants, by Leland & Harbach to the order of the plaintiff.

The 4th plea set up that the bill of exchange was drawn on the defendant, and was payable at St. Louis, in the State of Missouri, and that the promise by the defendants to accept the bill, if any such was made, was not in writing, and shown to the plaintiff, and that, by the laws of the State of Missouri, said promise was not binding on said defendants.

A demurrer was sustained to all these pleas.

We confidently submit that this demurrer was erroneously sustained.

Story, Conf. L., secs. 283, 280, 313; *Bk. v. Wells*, 8 Met., 107; *Hunt v. Standart*, 15 Ind., 38; *Boyes v. Edwards*, 4 Pet., 111; *Frazier v. Warfield*, 9 Sm. & M., 220; *Springer v. Foster*, 2 Story, 387.

The evidence complained of tended to prove a verbal authority from the defendant Scudder, to Leland & Harbach, to draw the bill in question, before it existed, and of acts and circumstances before and after the bill was drawn, tending to prove knowledge of and consent to the drawing of the bill, and an implied promise to pay the bill, without any evidence of presentment of the bill for acceptance or a refusal to accept and without evidence of any written authority or promise whatever.

In England the law seems settled that a party is not liable on a parol promise to accept a bill not yet drawn.

Par. N. & B., 292, 3; *Bk. of Ireland v. Archer*, 11 M. & W., 383.

By the law of France, a promise, even in writing, to accept a non-existing bill, does not make a party liable on a bill.

Pard. *Droit Comm.*, Com., 2, arts. 362, 363, 367.

In this country, the law was laid down at an early day by this court, in these terms:

"That a letter written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding on the person who makes the promise."

Coolidge v. Payson, 2 Wheat., 66.

The law thus laid down and adhered to in this court in subsequent cases, seems intended to cover all cases where a party was sought to be charged on an acceptance, and authority to draw or a promise to accept, without a written acceptance on the bill.

In the law thus laid down, the courts of the different States have generally acquiesced, and in some of the States, the law has been subsequently embodied in the statutes.

NOTE.—Acceptance or promise to accept a bill of exchange by letter or telegram. See note to *Coolidge v. Payson*, 15 U. S. (2 Wheat.), 66.

Lex loci and lex fori as to contracts, including bills and notes, as to drawer, acceptor, indorser, usury, etc. See note to *Slacum v. Pomery*, 10 U. S. (6 Cranch), 221.

Schimmelpennich v. Bayard, 1 Pet., 288; *Plummer v. Lyman*, 49 Me., 229; *Kennedy v. Geddes*, 8 Port. (Ala.), 268; *Parker v. Greole*, 2 Wend., 547; *Pike v. Irwin*, 1 Sandf., 14; *Boyce v. Edwards*, 4 Pet., 111.

Mr. Justice Thompson indulges in a dictum in the last named case, to the effect that an action might be maintained on a count properly framed upon the breach of the promise to accept. There is no such count in this case.

Bank of Ireland v. Archer, 11 M. & W., 883.

Mr. Melville W. Fuller, for defendant in error:

In Illinois the law is well settled, that a parol promise to accept an existing bill is valid and amounts in law to an acceptance.

Jones v. Bk., 34 Ill., 819.

This is equally so as to a non-existing bill.

Nelson v. Bk., 48 Ill., 89.

It seems now to be settled on authority, that an acceptance need not be in writing except where so required by statutory provisions.

1 Pars. Bills & N., 285, and cases cited in notes; *Barnet v. Smith*, 10 Fost., 256; *Bk. v. Worthington*, 12 Wend., 593; *Mason v. Dousay*, 35 Ill., 424.

The second count was on a breach of a promise to accept, the bill being taken upon the credit of such promise, and the Statute of Frauds was clearly no defense.

"Such a promise," said Mr. Justice Story, in *Townley v. Sumrall*, 2 Pet., 182, "is an original promise to the purchaser, not merely the promise for the debt of another, and hence not within the Statute of Frauds."

"A parol promise to accept or pay a non-existing bill, is no more within our Statute of Frauds than would be a similar promise to pay an existing bill; and clearly neither is within the statute."

Mr. Justice Lawrence, *Nelson v. Bk.*, 48 Ill., 41.

An action for the breach of a verbal promise to accept would lie in Missouri.

1 Wagner, Mo. Stat., 1872, p. 214.

There is no doubt whatever that in this country an action will lie for the breach of the promise to accept, and that was what this part of the declaration was counting on.

It is not an open question in this court.

Townley v. Sumrall (supra); *Boyce v. Edwards* (supra).

The object of this 4th plea, as of the 5th, 6th and 7th pleas, is, however, to present the question, whether as the bill was paid in Missouri, and as under the laws of Missouri, to charge a person as acceptor, the acceptance must be in writing, an action could not be maintained in, Illinois upon the bill, against the defendant as acceptor under a declaration counting on an acceptance, or a promise to accept as an acceptance.

We have already seen that the second count was, in legal effect, a count, not upon the bill but upon a breach of promise to accept; in other words, a count for non-acceptance after agreement to do so, and such a count would have been maintained in Missouri. Illinois being the place of the actual making and of the forum, the law of the expected place of performance, could not be invoked to defeat the action.

The *lex fori* concurring with the *lex contractus*, never yields to the *lex solutionis*.

See 1 OTTO

I repeat, that, in Illinois, the law is settled that a parol promise to accept an existing or a non-existing bill is a virtual acceptance.

Nelson v. Bk., 48 Ill., 89; *Mason v. Dousay*, 35 Ill., 424; *Jones v. Bk.*, 34 Ill., 819.

And that, as to existing bills, this is the general rule in England and in this country, where statutes have not intervened.

Bk. of Ireland v. Archer, 11 M. & W., 889; 1 Pars. Bills & N., 285.

Now, assuming that this is not so in Missouri, is the court in Illinois bound to enforce the law of Missouri, when Illinois is the place where the contract is actually entered into? Clearly not; and all the special pleas were insufficient in law.

The rule is laid down in *Bk. of Ireland v. Archer*, that "A promise to accept a bill not yet drawn does not amount to an acceptance of it, although the bill be discounted for the drawer on the faith of such promise;" and the reasoning of the court applies this rule to a written as well as verbal promise, any distinction between which is pronounced to be entirely exploded; but it is also stated in the opinion that the doctrine is not now disputed, that a promise to honor an existing bill operates as an acceptance.

This is thoroughly settled in the United States, whether the promise be by parol or in writing.

Mason v. Dousay, 35 Ill., 424; *Jones v. Bk.* (supra); *Hough v. Loring*, 24 Pick., 254; *Ward v. Allen*, 2 Met., 53; *Bk. v. Woodruff*, 34 Vt., 92; *Leonard v. Mason*, 1 Wend., 523; *Spaulding v. Andrews*, 48 Pa., 411.

The promise to accept need not be expressed in words, it being well settled that any conduct on the part of the drawee by which he intends the holder to understand that he means to accept or pay, or, as it has been sometimes and perhaps more accurately expressed, any act giving credit to the bill, will amount to an acceptance.

Byles, Bills, 149; *Williams v. Winans*, 2 Green (N. J.), 339; *Lannan v. Smith*, 7 Gray, 150; *Bk. v. Woodruff* (supra); *Storer v. Logan*, 9 Mass., 56.

But suppose it had been a bill to be drawn, still the promise would have been binding as an acceptance, if taken on the faith and credit of such promise.

Nelson v. Bk., 48 Ill., 89; *Bissell v. Lewis*, 4 Mich., 450; *Crowell v. Van Bibber*, 18 La. Ann., 687; *Williams v. Winans* (supra).

It is well settled that an authority which fails as an acceptance, is valid as a promise to accept, not only as between the original parties, but in favor of anyone who gives value on the faith of the assurance which it holds forth.

Townley v. Sumrall, 2 Pet., 170; *Boyce v. Edwards*, 4 Pet., 111; *Lonsdale v. Bk.*, 18 Ohio, 126; *Cornegie v. Morrison*, 2 Met., 381; *Baring v. Lyman*, 1 Story, 396; *Russell v. Wiggin*, 2 Story, 240.

Mr. Justice Hunt delivered the opinion of the court:

It is not necessary to examine the question, whether a denial of the motion to set aside the summons can be presented as a ground of error on this hearing. The facts are so clearly against the motion, that the question does not arise.

Nor does it become necessary to examine the

question of pleading, which is so elaborately spread out in the record. The only serious question in the case is presented upon the objection to the admission of evidence and to the charge of the judge.

Upon the merits, the case is this: the plaintiff below sought to recover from the firm of Henry Ames & Co., of St. Louis, Mo., the amount of a bill of exchange, of which the following is a copy, viz.:

"\$8,125.00. CHICAGO, July 7, 1871.

Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of

LELAND & HARBACH.

To Messrs. Henry Ames & Co., St. Louis, Mo."

By the direction of Ames & Co., Leland & Harbach had bought for them, and on the 7th day of July, 1871, shipped to them at St. Louis, 500 barrels of pork, and gave their check on the Union Bank to Hancock, the seller of the same, for \$8,000.

Leland & Harbach then drew the bill in question, and sent the same by their clerk to the Union Bank (the plaintiff below) to be placed to their credit. The Bank declined to receive the bill, unless accompanied by the bill of lading or other security. The clerk returned, and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the Bank, and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago, and had authorized the drawing of the draft; that it was drawn against 500 barrels of pork that day bought by Leland & Harbach for them, and duly shipped to them. The clerk returned to the Bank, and made this statement to its Vice-President; who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same, and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds, the check given to Hancock for the pork was paid by the Bank.

The direction, to inform the Bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft, was made in the presence and in the hearing of Scudder and without objection by him.

The point was raised in various forms upon the admission of evidence, and by the charge of the judge, whether, upon this state of facts, the firm of Ames & Co., the defendants, were liable to the Bank for the amount of the bill. The jury, under the charge of the judge, held them to be liable; and it is from the judgment entered upon that verdict that the present writ of error is brought.

The question is discussed in the appellant's brief, and properly, as if the direction to the clerk had been given by Scudder in person. The jury were authorized to consider the direction in his name, in his presence and hearing, without objection by him, as made by himself.

The objection relied on is, that the transaction amounted at most to a parol promise to accept a bill of exchange then in existence. It is insisted that such a promise does not bind the defendants.

The suit to recover upon the alleged acceptance, or upon the refusal to accept, being in the State of Illinois, and the contract having been

made in that State, the judgment is to be given according to the law of that State. The law of the expected place of performance, should there be a difference, yields to the *lex fori* and the *lex loci contractus*.

In Wheaton on Conflict of Laws, sec. 401, *p.*, the rule is thus laid down:

"Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted and, in all cases not specified above, supplies the applicatory law."

Miller v. Tiffany, 1 Wall., 810 [68 U.S., XVII., 548]; *Chapman v. Robertson*, 6 Paige, 684; *Andrews v. Pond*, 13 Pet., 78; *Lanusse v. Baker*, 3 Wheat., 147; *Adams v. Robertson*, 37 Ill., 59; *Ferguson v. Pyffe*, 8 Cl. & F., 121; *Bain v. R. Co.*, 8 H. L. Cas., 1; *Scott v. Pilkington*, 15 Abb. Pr., 280; Story, Conf. L., 208; *De Wolf v. Johnson*, 10 Wheat., 888.

The rule is often laid down, that the law of the place of performance governs the contract.

Mr. Parsons, in his "Treatise on Notes and Bills," uses this language: "If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written, or signed or dated." P. 824.

For the purposes of payment, and the incidents of payment, this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance.

The time, manner and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (*Young v. Harris*, 14 B. Mon., 556; *Pomeroy v. Ainsworth*, 22 Barb., 118), are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.

The same author, however, lays down the rule, that the place of making the contract governs as to the formalities necessary to the validity of the contract. P. 817. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. *Dacosta v. Davis*, 4 Zab., 819.

So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. *Aymar v. Sheldon*, 12 Wend., 489.

So if a note, payable in New York, be given in the State of Illinois for money there lent, reserving ten per cent. interest, which is legal in

that State, the note is valid, although but seven per cent. interest is allowed by the laws of the former State. *Miller v. Tiffany*, 1 Wall., 810 [68 U. S., XVII., 543]; *Depeau v. Humphry*, 20 How., 1 [8 Mart. (N. S.), 1]; *Chapman v. Robertson* [supra]; *Andrews v. Pond* [supra].

Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

A careful examination of the well-considered decisions of this country and of England will sustain these positions.

There is no statute of the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange; on the contrary, a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance. *Nelson v. Bk.*, 48 Ill., 39; *Mason v. Dousay*, 35 Ill., 424; *Jones v. Bk.*, 34 Ill., 319.

Unless forbidden by statute, it is the rule of law generally, that a promise to accept an existing bill is an acceptance thereof, whether the promise be in writing or by parol. *Wynne v. Raikes*, 5 East, 514; *Bk. of Ireland v. Archer*, 11 M. & W., 388; *Hough v. Loring*, 24 Pick., 254; *Ward v. Allen*, 2 Met., 53; *Bk. v. Woodruff*, 34 Vt., 92; *Spaulding v. Andrews*, 48 Pa., 411; *Williams v. Winans*, 2 Green (N. J.), 309; *Storer v. Logan*, 9 Mass., 56; Byles, Bills, sec. 149; *Barney v. Worthington*, 37 N. Y., 112. See the Illinois cases cited supra.

Says Lord Ellenborough, in the first of these cases, "A promise to accept an existing bill is an acceptance. A promise to pay it is also an acceptance. A promise, therefore, to do the one or the other—i. e., to accept or certainly pay—cannot be less than an acceptance."

In *Williams v. Winans*, Hornblower, C. J., says: "The first question is, whether a parol acceptance of a bill will bind the acceptor; and of this there is at this day no room to doubt. The defendant was informed of the sale, and that his son had drawn an order on him for \$125; to which he answered, it was all right. He afterwards found the interest partly paid, and the evidence of payment indorsed upon it in the handwriting of the defendant. These circumstances were proper and legal evidence from which the jury might infer an acceptance."

It is a sound principle of morality, which is sustained by well considered decisions, that one

who promises another, either in writing or by parol, that he will accept a particular bill of exchange, and thereby induces him to advance his money upon such bill, in reliance upon his promise, shall be held to make good his promise. The party advances his money upon an original promise, upon a valuable consideration; and the promisor is, upon principle, bound to carry out his undertaking. Whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of his promise to accept, or whether he shall be held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promisor to pay the amount of the bill with interest. *Townesley v. Sumrall*, 2 Pet., 170; *Boyce v. Edwards*, 4 Pet., 111; *Goodrich v. Gordon*, 15 Johns., 6; *Scott v. Pilkington*, 15 Abb. Pr., 280; *Bk. v. Worthington*, 12 Wend., 593; *Bissell v. Lewis*, 4 Mich., 450; *Williams v. Winans*, supra.

These principles settle the present case against the appellant.

It certainly does not aid his case, that after assuring the Bank, through the message of Leland & Harbach, that the draft was drawn against produce that day shipped to the drawees, and that it was drawn by the authority of the firm (while, in fact, the produce was shipped to and received and sold by them), and that the Bank, in reliance upon this assurance, discounted the bill, Mr. Scudder should at once have telegraphed his firm in St. Louis to delay payment of draft, and, by a subsequent telegram, should have directed them not to pay it.

The judgment must be affirmed.

Cited—106 U. S., 127; 130, 134; 15 Blatchf., 85; 5 Dill., 484; 15 Bk. Reg., 498; 22 Kan., 99; 35 Mich., 861; 125 Mass., 375; 28 Am. Rep., 242; 77 N. Y., 585; 33 Am. Rep., 680; 82 N. Y., 420; 37 Am. Rep., 579; 12 R. I., 266; 34 Am. Rep., 636.

Ex parte IRA G. FRENCH, *Petitioner*.

(See S. C., 1 Otto, 423-426.)

Decision of this court, effect of.

Where the decision of this court only precludes the court below from adjudging in favor of the defendants upon the special facts found and sent here, in all other respects, it is at liberty to proceed in such manner as, according to its judgment, justice may require.

[No. 7, Original.]

Argued Nov. 8, 1875. Decided Nov. 29, 1875.

PETITION for *mandamus*.

The case is stated by the court.

Messrs. S. O. Houghton and John Reynolds, in support of the motion for *mandamus*:

Section 914 U. S. Rev. Stat. adopts the state practice in common law cases; and section 701, so far as it affects this question, is substantially the same as the statutes of California, under which it has been the settled practice of the Supreme Court of California since *Holland v. San Francisco*, decided in 1857, to direct final judgment on the reversal of the judgment when the case was decided in the Supreme Court upon special findings of fact.

Stat. of Cal., 1853, p. 289, sec. 8; 1863, p. 334, sec. 7; Code C. P., sec. 45; *McMillan v. Richards*, 9 Cal., 421; *Wallace v. Moody*, 26 Cal.,

897; *Page v. Rogers*, 81 Cal., 298; *McMillan v. Vischer*, 14 Cal., 242.

All the facts are found necessary to a final determination of the case. The opinion and directions of this court are conclusive, and there was no discretion left to be exercised by the circuit court. It may be claimed by the defendant's counsel that they could have proven other facts in their defense. But if the defendants are permitted to withhold portions of their defense and send the case here on special verdicts to determine one question at a time, there would be no end of litigation.

Messrs. George F. Edmunds and J. H. McCune, in opposition to the petition:

This case is covered by sections 649, 700, 710 of the Revised Statutes. It is, of course, admitted, that the court below is bound to obey the mandate of this court; but, as was said in the case of *R. R. Co. v. Souther*, 2 Wall., 510 (69 U. S., XVII., 900), such a mandate is, if possible, to be so construed as not to defeat the ends of justice. Nor will a *mandamus* be allowed when anything but a mere ministerial act is to be done.

Ins. Co. v. Wilson, 8 Pet., 291; *Ex parte Many*, 14 How., 24; *Comr. v. Whitely*, 4 Wall., 522 (71 U. S., XVIII., 835); *Ex parte Sawyer*, 21 Wall., 286 (88 U. S., XXII., 617).

The decision in this case was (*French v. Edwards*, 21 Wall., 147 (88 U. S., XXII., 534)), that the facts found were not sufficient to support the judgment. That judgment was, therefore, reversed and the mandate was to proceed in accordance with the opinion; which the court below will do, it must be presumed, when it proceeds to try the case. The record in the case in 21 Wall. (88 U. S., XXII., 534), contained only those facts which bore upon the precise point decided by the court. As a matter of fact, other circumstances appeared in evidence and were not inserted in the findings of the court, because the court decided that, upon the naked facts of the plaintiff's conveyance alone, he could not recover. It is manifest, therefore, that to require the court below to pronounce a judgment for the plaintiff, would produce gross injustice, as appears from the facts stated in the answer to the petition.

Mr. Chief Justice Waite delivered the opinion of the court:

French sued Edwards and others to recover the possession of certain lands, alleging that he was the owner in fee, and that the defendants unlawfully withheld the possession from him.

The defendants answered, setting up several defenses, and among others the following:

1. Want of title in the plaintiff.
2. Statute of Limitations.
3. In some instances, title in themselves.

The case was submitted to the court without a jury; and upon the trial there was a special finding of facts, to the effect that the defendants were in the adverse possession of the property; that the plaintiff once held the title, but that, on the 9th January, 1863, and before the commencement of the suit, he had executed a certain instrument of writing, a copy of which was given.

Upon these facts, the court found, as a matter of law, that the legal title passed out of the

plaintiff by the operation of the instrument set forth; and did not revert on the failure of the conditions it contained, but still remained and was vested in the grantees. Judgment was given in favor of the defendants upon this finding. The case was then brought here, and error assigned upon this ruling. At the last Term we decided, that, upon the facts found, the court should have presumed that the grantees in the instrument of Jan. 9 had reconveyed, thus re-investing the title in the plaintiff, and adjudged accordingly. The judgment was for this reason reversed, and the case remanded "with instructions to proceed in conformity with the opinion." See the case reported, 21 Wall., 147 [88 U. S., XXII., 534].

Upon the filing of the mandate in the court below, the case was set down for a new trial. French now moves here for a *mandamus*, directing the circuit court to enter judgment in his favor for the recovery of the lands upon the facts found.

The finding brought here for review was special, and met only a part of the issues. If the conclusion of law to which the court came was correct, the other issues were immaterial. The case was disposed of without reaching them. We have, however, determined that the facts found were not sufficient to justify the conclusion reached; and have ordered the court to proceed with the case, notwithstanding the finding. In effect, we have decided that the court erred in not proceeding to try the other issues. Our action only precludes that court from adjudging in favor of the defendants upon the special facts found and sent here for our opinion. In all other respects, it is at liberty to proceed in such manner as, according to its judgment, justice may require.

The petition for a mandamus is denied.

Cited—91 U. S., 488.

UNITED STATES, *Plff.*,

v.

JOHN W. NORTON.

(See S. C., 1 Otto, 558.)

Motions in criminal causes.

Motions to advance criminal causes must state the facts in such manner that this court may judge whether the Government will be embarrassed in the administration of its affairs by delay.

[No. 518.]

Argued Nov. 15, 1875. Decided Nov. 29, 1875.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

On motion to advance the cause on the docket.

Mr. E. B. Smith Asst. Atty-Gen., for plaintiffs in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This is a criminal case. The motion to advance is made on behalf of the United States.

upon the representation of the Postmaster-General, in substance, that the questions in dispute will embarrass the operations of the Government while they remain unsettled. As our Rule has but recently gone into operation, we will, in this case, accept this statement as sufficient, and grant the motion. Hereafter, motions to advance upon this ground must state the facts in such manner that we may judge whether the Government will be embarrassed in the administration of its affairs by delay. In the present crowded state of the docket, it is our duty to see that cases are not unnecessarily brought forward to the prejudice of others.

The case may be set down for argument on the 15th day of March.

FRANCIS DAINESE, *Appt.*,

v.

THE BOARD OF PUBLIC WORKS OF
THE DISTRICT OF COLUMBIA, Con-
sisting of HENRY D. COOKE ET AL.

SAME v. SAME.

(See S. C., 1 Otto, 580-584.)

Injunction to prevent erection of buildings.

Where there is a regular written permit, by the Inspector of Buildings, to erect buildings in Washington City, a clear case of departure from the permit or danger to public interests must be established before the person receiving the permit can be enjoined from proceeding with the construction of the buildings.

[Nos. 88, 89.]

Argued Nov. 10, 1875. Decided Nov. 29, 1875.

A PPEALS from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. F. P. Cuppy and John W. Ross, for appellant.

Mr. E. L. Stanton, for appellee.

Mr. Justice Miller delivered the opinion of the court:

These are appeals by Dainese in two cases from decrees of the Supreme Court of the District of Columbia, in one of which he was complainant, and his bill was dismissed.

In the other he was defendant, and a perpetual injunction was decreed against him. As the subject-matter of these suits is the same, they will be considered together in this court, and should have been consolidated and heard together in the court below, though two separate decrees were rendered, and separate records are presented to us.

The appellant's bill was filed first. He therein alleges, that having made a contract with one Wesley Frey, on the 29th August, 1872, for the construction of a block of frame buildings on the south side of C Street southeast, in Washington City, he applied to Adolph Cluss, Inspector of Buildings, exhibited to him said contract, and obtained his regular written permit

to erect the buildings; that Frey entered upon the work; and, when he had so far progressed with the buildings that he was ready to put on the roof, plaintiff received on the 25th November, from said Cluss, a notification, that, unless he removed them, he, Cluss, would be compelled to take them down at once at complainant's expense. The contract for the buildings, the permit to build, and the demand to remove them, are made exhibits. The latter is based upon the ground that the buildings are not in conformity with the regulations in force in the city, and that they are of insufficient material, and dangerous to the community. The prayer of the bill is for an injunction against the Board of Public Works, of which Cluss was a member, to prevent their interference with his buildings. On the filing of this bill a temporary restraining order was granted, and the hearing of the application for injunction set for the 7th day of December.

The record discloses no further action in this case until January 4, when the answer of the Board of Public Works and the separate answer of Cluss were filed.

The answer, in substance, admits that the contract with Frey was shown to Cluss, and that Cluss issued a permit to build. It denies that the buildings conform to the contract or to the permit, and avers that the materials of which they are being constructed are insufficient and dangerous; and that, such being the opinion of Cluss, the Inspector of Buildings, the Board had ordered their further construction to be arrested; and on the failure of Dainese to conform to their requirements, they ordered that the buildings should be pulled down by the police force.

They annex, as exhibits, the affidavits of Morsell, Wilson, Edmonston and Fleming, in support of their allegation of the character of the work; and also the rules and regulations respecting the construction of private buildings, prepared by them as a Board of Public Works.

The next record entry in this case is under date of January 11, 1873, and is as follows: "This cause came on to be heard on bill, answer and affidavits. It is thereupon this day adjudged, ordered and decreed that complainant's bill be, and hereby is dismissed."

On appeal to the General Term, this decree was ordered to be affirmed without prejudice. What this qualification may mean we are quite at a loss to determine.

In this record there is no evidence in behalf of defendants except four affidavits filed with their answer as exhibits. There are eleven affidavits on behalf of complainant.

Adverting now to the other case, No. 88, it presents a bill filed by the appellees, who compose the Board of Public Works, against Dainese and Frey, to prevent them from proceeding with the work on the same buildings, which are the subject of the first suit. This bill was presented to Judge Wylie on the 31st December, 1872, when he granted a restraining order, and set the motion for an injunction for hearing at the City Hall, January 11, 1873, at eleven o'clock A. M. The bill itself was afterwards—to wit: January 2—filed in the Supreme Court. The answer of Frey is filed January 6, and that of Dainese January 7; and the next action is on the 11th of that month, when the following record entry was made:

NOTE.—*Jurisdiction of U. S. Supreme Court, where federal question arises, or where is drawn in question statute, treaty or Constitution of United States. See note to Matthews v. Zane, 8 U. S. (4 Cranch), 382; note to Martin v. Hunter, 14 U. S. (1 Wheat.), 304; and note to Williams v. Norris, 25 U. S. (12 Wheat.), 117.*

See 1 OTTO.

"This cause came on to be heard on bill, answer and affidavits. The cause was argued by counsel. It is, thereupon, this day adjudged, ordered and decreed that the injunction prayed for in said bill be and the same is hereby made permanent."

There is found in this transcript a statement of Dr. Verdi, health officer; of A. B. Mullett, who styles himself consulting architect of the Board of Public Works; a protest of some twenty citizens against the buildings, also of the trustees of School District No. 3, all of which are unsworn, and wholly without authentication.

There are but two affidavits in support of the bill; that of Entwistle and of Wood.

The bill alleges, in the same general terms as the answer to the bill in the first suit, that the buildings were of insufficient material, dangerous to the community, and in violation of the Building Regulations, especially sections 3, 5, 6, 9, 32, 33, 36. The answer is a specific and full denial of these allegations, and is supported by four affidavits.

There is no replication to the answer in either case, and no stipulation that the affidavits may be treated as depositions on the hearing. There is no order disposing of the application for a preliminary injunction in either case.

Taking, however, the short and sententious order of the court to be as it purports—a final hearing on bill, answer and affidavits in each case—we are of opinion that the preponderance of evidence as to the only issue made is in favor of the appellant. That issue was, whether the materials were so defective as to justify the arrest of the work after so much had been done, and whether the mode of constructing the buildings endangered the public safety.

In deciding this question, the protest of citizens, and of the trustees of the school district, the statement of Dr. Verdi and the certificate of Mullett, cannot be considered, because they are not affidavits, and are not evidence under any circumstances, unless by consent.

Looking to the suit of the Board against Dainese, we have his full and unequivocal denial of the charges in his answer; and also that of Frey, supported by a decided preponderance of affidavits; and though we may suspect, from the fact that several of these latter are signed with a cross, that they were not the most intelligent men that could be found, they were probably mechanics engaged in the work, and fully capable of telling whether timbers were in a state of decay, or were badly put together. If it be true that the proper officer, on examining appellant's contract, gave a permit for the erection of such buildings as it contemplated—and of this there is no denial—the other side should make a clear case of departure from the permit, or danger to public interests, before appellant should be arrested midway in the construction of the buildings, and have them summarily torn down, with all the necessary loss and expense to him of such a course. There is no such clear case made, and the evidence preponderates the other way; and we must, on this ground alone, reverse both decrees.

Usually, when a case in chancery has been heard, and a final decree rendered, this court, if it reverses that decree, will direct such decree as the court below should have rendered; which in this case would be to dismiss the bill of the

Board of Public Works and render a perpetual injunction against them on the bill of appellant. But, pending the appeal, the Board of Public Works has been abolished. The buildings undoubtedly have been removed; and no injunction against their removal can restore them or compensate the appellant for their removal.

Besides, the summary and irregular manner in which the case was tried below leaves this court in great doubt as to what was tried, and on what evidence the cases were heard.

On the whole, we shall order the decree of the Supreme Court of the District of Columbia to be reversed in each of the cases; that they be remanded to that court for such further proceedings, including leave to amend pleadings, as may be in accordance with equity and with this opinion. Appellant to recover his costs of appeal in both cases.

ANNIE KNOTTS ET AL., Infants, by their
Next Friend, EMILY J. KNOTTS, Appts.,

v.

FRANKLIN STEARNS, Exr. of C. J. BALDWIN, Deceased, ET AL.

See S. C., 1 Otto, 638-642).

Posthumous child, rights of—sale of estate—when bound by—purchaser at judicial sale, not affected by wrong disposition of purchase money.

1. A posthumous child does not possess, until born, any estate in the real property of which his father died seised which can affect the power of the court to convert the property into a personal fund, if the interest of the children then in being or the enjoyment of the dower right of the widow requires such conversion.

2. In Virginia, parties in being, possessing an estate of inheritance, are regarded as so far representing all persons, who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties.

3. A purchaser at a judicial sale is not bound in any case to see to the application of the purchase money; and the title of the purchaser is not affected, however unwise or illegal the disposition of the money. This rule applied to an investment of the purchase money in securities of the Confederate States.

[No. 87.]

Submitted Nov. 10, 1875. Decided Nov. 29, 1875.

A PPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

The plaintiffs, now appellants, filed their bill in the Chancery Court of the City of Richmond, on the first Monday in January, 1870. They afterwards procured the removal of the case to the Circuit Court of the United States for the Eastern District of Virginia, and that court, on May 18, 1873, upon a hearing of the cause, dismissed the bill with costs.

From this decree the appeal is taken.

The case is stated by the court.

Messrs. John Johns, Jr., and W. A. Maury, for appellants.

Mr. John A. Meredith, for appellees.

Mr. Justice Field delivered the opinion of the court:

This suit was brought to set aside a sale and conveyance of certain real estate situated in Richmond, Virginia, of which one Edwin

Knotts died seized, made in 1865, under a decree of the circuit court of that city, and to compel a delivery of the property to the possession of the plaintiffs. The decree for the sale was obtained upon a bill filed for that purpose by the guardian of the infant children of the deceased, to which his widow was made a party. The property sold consisted of a house and lot, which, with a few articles of household furniture, constituted the entire estate of the deceased. The house was at the time much out of repair; so much so, that in its then condition it could not be rented; and neither the widow nor the children had any means to repair it. Nor had they any other estate to which they could look as a source of support. The widow was entitled to dower in the property, and it was incapable of partition according to the respective rights of the parties. It was, therefore, manifestly for the interest of all of them that the property should be sold, and the proceeds converted into a fund which would give to them some income. The Circuit Court of Richmond was invested with jurisdiction under such circumstances, upon a proper showing of the facts, to decree a sale of the estate of the children. A law of the State expressly conferred the jurisdiction, and authorized its exercise upon a bill filed by the guardian for that purpose, if it was clearly shown, independently of admissions in the answer, that the interest of the infants would be promoted by the sale, and the court was satisfied that the rights of others would not be violated by the proceeding. Code of Virginia of 1860, ch. 128. The widow consented to the decree so far as her interests were concerned; and it is only with reference to the estate of the children that any inquiry into the validity of the sale can now be had.

The greater part of the papers and entries in the suit in the Circuit Court of Richmond was destroyed by the fire which occurred on the 8d of April, 1865—the day on which the city was occupied by the Army of the United States; but their absence was in a great degree supplied by the testimony of the counsel of the guardian, under whose advice the suit was brought and conducted. That testimony, and copies of the decrees preserved, show that the proceedings were regularly taken in accordance with the provisions of the statute and the practice of the court. The bill was filed by the general guardian, and the widow and children were made parties defendants; they all appeared to the suit, the children by a special guardian *ad litem* appointed by the court. A reference was had to a commissioner to ascertain the facts required by the statute to authorize a sale. His report showed the condition of the property, and that the interest of all parties would be promoted by its sale, and that no rights of any other person would be violated thereby. The report was accepted and approved; and a decree for the sale was accordingly made, which was entered on the 18th of March, 1863. The sale under it was had on the 5th of April following, when the testator of the defendant, Stearns, became the purchaser for the sum of \$13,800 cash. The sale was approved, and a deed of the property ordered and executed to the purchaser.

The widow gave birth to a posthumous child in May following the death of her husband; and

the validity of the decree is assailed because this unborn child was not made a party, nor its interests specifically considered, in the previous proceedings in the suit.

The decree, after ordering a sale of the property, also provided for the investment of the proceeds in bonds or stock of the Confederate States, or of any State belonging to the Confederacy, or of the City of Richmond. The proceeds were invested in bonds of the Confederacy, and the investment was approved by the court. It is now contended that the decree of sale was invalid because of the direction for the investment of the proceeds, and the subsequent approval of the investment made; the counsel of the appellants insisting that aid was thus directly given to the rebellion.

These two grounds constitute the principal objections to the decree. Neither of them, in our judgment, affects the validity of the sale.

The posthumous child did not possess, until born, any estate in the real property of which his father died seized which could affect the power of the court to convey the property into a personal fund, if the interest of the children then in being, or the enjoyment of the dower right of the widow, required such conversion. Whatever estate devolved upon him at his birth was an estate in the property in its then condition. That property had then ceased to be realty; it had become, by the sale, converted into personalty. All that was then required for the protection of his interest in it was the appointment of a guardian to take possession of his proportion; and such a proceeding was had. A guardian was appointed; and upon a supplemental bill the original decree was so far modified as to provide for the child having an equal interest in the fund obtained with the other children.

But there is another answer to the objection. Assuming that the child, before its birth, whilst still *en ventre sa mère*, possessed such a contingent interest in the property as required his representation in the suit for its sale, he was thus represented, according to the law which obtains in Virginia, by the children in being at the time who were then entitled to the possession of the estate. Parties in being possessing an estate of inheritance are there regarded as so far representing all persons, who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties. In the case of *Faulkner v. Davis*, which is reported in the 18th of Grattan, 651, this subject is elaborately and learnedly considered. In that case, a trust estate, created for the benefit of a man and his wife during their joint lives and the life of the survivor of them, and of their children living at the death of the survivor, and of the descendants of such of the children as might be then dead, had been sold by a decree of the Circuit Court of Richmond, rendered in a suit for that purpose brought by the surviving widow, in which the children were made parties, but in which no one appeared to protect the interests of any of their descendants; and the court held that the sale was valid and that the descendants of any child, dying in the lifetime of the surviving widow, were bound by the decree, on the ground that the children were to be considered as representing before the court any of their descend-

ants who might, upon their death, become entitled under the trusts of the deed.

The Statute of Virginia, as additional security against improvident proceedings for the sale of an infant's estate, requires that all those who would be heirs or distributees of the infant, if dead, shall be made parties. This requirement was met in the case under consideration; for, upon the death of either child, the mother and other child would have been its heirs, and the distributees of its estate.

With the investment of the proceeds of the sale the purchaser under the decree had no concern. A purchaser at a judicial sale is not bound in any case to see to the application of the purchase money. That is under the control of the court; and the title of the purchaser is not affected, however unwise or illegal the disposition of the money.

The case of *Horn v. Lockhart*, 17 Wall., 570 [84 U. S., XXI., 657], which is invoked by the appellants, lends no support to their pretensions. That was the case of an executor in Alabama seeking to escape an accounting and payment to legatees of proceeds of property of the estate in his hands sold previous to the war, and retained by him for years after he had been called to a final account by the Probate Court of the State, by alleging a voluntary investment of the proceeds in bonds of the Confederate Government. Those bonds were issued for the express purpose of raising funds to carry on the war then waged against the United States. The investment was, therefore, held to be illegal, because it constituted a direct contribution to the resources of the Confederate Government, thus giving aid and comfort to the enemies of the United States; and the character of the transaction in this respect was not deemed to have been changed by the fact that the investment was authorized by the existing legislation of the State, and was approved by the subsequent decree of its Probate Court. A voluntary proceeding in aid of a treasonable organization could not be thus freed from its original unlawfulness.

There is no analogy between that case and the one at bar. Here no action is sought to be upheld which was taken in aid of the insurrectionary government. The sale in question was not made with any reference to that government, but solely to raise a fund which would yield an income for the support of the widow and children, and was, therefore, a lawful proceeding.

The widow and the guardian were not compelled to take the bonds of the Confederate Government; they were allowed the option of investing in such bonds, or bonds of any of the States of the Confederacy, or bonds of the City of Richmond. Having deliberately selected the securities of the insurrectionary government in which to place their money, it would be a strange thing if complaints could now be heard from them against the title of the purchaser of the property, who had nothing to do with the disposition of the money, on the ground that the court did not preserve them from the folly of that investment.

We perceive no error in the decrees of the court below and it is, accordingly, affirmed.

CHARLES A. NICHOLS, Assignee of AMASA M. EATON, a Bankrupt, *Appl.*,

v.

AMASA M. EATON ET AL.

(See S. C., 1 Otto, 716-730.)

Devise, to cease on insolvency, valid—interest of devisee—when ceases—assignee in bankruptcy—unsound doctrine.

1. A devise of the income of property, to cease on the insolvency or bankruptcy of the devisee, and to then go to his wife or children, is valid.

2. Where the devise over, after the bankruptcy of the devisee, was, that during the residue of the life of the devisee such income should be paid to his wife and children, and in case there was no wife or child, the income should accumulate in augmentation of the principal fund, the devisee has no interest which his assignee in bankruptcy can reach.

3. In such case the insolvency of the devisee terminated all his legal vested right in the estate, and left nothing in him which could go to his creditors, or to his assignees in bankruptcy or to his prior assignee.

4. What may come to the devisee after his bankruptcy through the voluntary action of the trustees under the terms of the discretion reposed in them, is his lawfully and cannot be subjected to the control of his assignee.

5. This court is not prepared to adopt the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors.

[No 22.]

Argued Oct. 13, 14, 1875. Decided Nov. 29, 1875.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The case is stated by the court.

Messrs. Horatio Rogers and C. S. Bradley, for appellant.

Messrs. Abraham Payne, B. R. Curtis and Samuel Currey, for appellee.

Mr. Justice Miller delivered the opinion of the court:

The controversy in this case arises on the construction and legal effect of certain clauses in the will of Mrs. Sarah B. Eaton. At the time of her death, and at the date of her will, she had three sons and a daughter; being herself a widow, and possessed of large means of her own. By her will, she devised her estate, real and personal, to three trustees, upon trusts to pay the rents, profits, dividends, interest and income of the trust-property to her four children equally, for and during their natural lives and, after their decease, in trust for such of their children as shall attain the age of twenty-one, or shall die under that age having lawful issue living; subject to the condition, that if any of her children should die without leaving any child who should survive the testatrix and attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the trusts declared in said will concerning the other share or respective shares. The will also contained a pro-

NOTE.—Wills; conditions precedent and subsequent in, who may perform and their effect; implication unperformed. See note to *Taylor v. Mason*, 23 U. S. (9 Wheat.), 325; and note to *U. S. v. Clarke*, 34 U. S. (9 Pet.), 168.

vision, that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust fund was to be paid to the wife and children, or wife or child, as the case might be, of such son; and, in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund.

There is another proviso, which, as it is the main ground of the present litigation, is here given *verbatim*, as follows:

"Provided, also, that in case at any future period circumstances should exist, which, in the opinion of my said trustees, shall justify or render expedient the placing at the disposal of my said children respectively any portion of my said real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one half of the trust fund from whence his or her share of the income under the preceding trusts shall arise; and, immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust fund as shall be so transferred shall absolutely cease and determine; and in case after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened."

The daughter died soon after the mother, without issue, and unmarried. Amasa M. Eaton, one of the sons of the testatrix, failed in business, and made a general assignment of all his property to Charles A. Nichols for the benefit of his creditors, in March, 1867; and in December, 1868, was, on his own petition, declared a bankrupt, and said Nichols was duly appointed his assignee in bankruptcy. Said Amasa was then, and during the pendency of this suit, unmarried, and without children. He, William M. Bailey, and George B. Ruggles (a son of testatrix by a former husband), were the executors, and trustees of the will.

It will be seen at once, that whether regard be had to the assignment before bankruptcy, or to the effect of the adjudication of bankruptcy, and the appointment of Nichols as assignee in that proceeding, one of the conditions had occurred on which the will of Mrs. Eaton had declared that the devise of a part of the income of the trust estates to Amasa M. Eaton should

cease and determine; and, as he had no wife or children in whom it could vest, it became, by the alternative provision of the will, a fund to accumulate until his death, or until he should have a wife or child who could take under the trust.

But Nichols, the assignee, construing the whole of the will together, and especially the proviso above given *verbatim*, to disclose a purpose, under cover of a discretionary power, to secure to her son the right to receive to his own use the share of the income to which he was entitled before the bankruptcy, in the same manner afterwards as if that event had not occurred, brought this bill against the said executors and trustees to subject that income to administration by him as assignee in bankruptcy for the benefit of the creditors.

This claim of the assignee is founded on the proposition, ably presented here by counsel, that a will which expresses a purpose to vest in a devisee either personal property or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy, as being in fraud of the rights of creditors; or as expressed by Lord Eldon in *Brandon v. Robinson*, 18 Ves. 438: "If property is given to a man for his life, the donor cannot take away the incidents of a life estate."

There are two propositions to be considered as arising on the face of this will as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? And 2. If so, is that principle to be the guide of a court of the United States sitting in chancery?

Taking for our guide the cases decided in the English courts, the doctrine of the case of *Brandon v. Robinson* seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of the devisee, is good, and that the limitation is valid. *Dommett v. Bedford*, 3 Ves., 149; *Brandon v. Robinson*, 18 Ves., 429; *Rochford v. Hackman*, 9 Hare, 475; *Lewin, Tr.*, 80, ch. VII., sec. 2; *Tillinghast v. Bradford*, 5 R. L., 205.

If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee, the trust as to him should cease and determine; or if there had been a simple provision, that, in such event, that part of the income of the estate should go to some specified person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child or children of such bankrupt, and in such manner as said trustees in their discretion shall think proper. There does not seem to be any doubt that if the bankrupt devisee had a wife or child living to take under this branch of the will, there would be nothing left which could go to his assignee in bankruptcy. The cases on this point are well considered in *Lewin on Trusts*, above cited, and the doctrine may be stated, that a direction that the trust to the first taker shall cease on his bankruptcy, and shall then go to his wife or children, is valid, and the entire interest passes to them; but that if the devise be to

him and his wife or children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from those of his wife or children, and be paid over to his assignee. *Page v. Way*, 3 Beav., 20; *Piercy v. Roberts*, 1 Mylne & K., 4; *Rippon v. Norton*, 2 Beav., 68; *Lord v. Bunn*, 2 Younge & C. Ch., 98. Where, however, the devise over is for the support of the bankrupt and his family, in such manner as the trustees may think proper, the weight of authority in England seems to be against the proposition that any thing is left to which the assignee can assert a valid claim. *Twopeny v. Peyton*, 10 Sim., 487; *Godden v. Crowthurst*, 10 Sim., 487.

In the case before us, the trustees are authorized, in the event of the bankruptcy of one of the sons of testatrix without wife or children (which is the condition of the trust as to Amasa M. Eaton), to loan and re-invest that portion of the income of the estate in augmentation of the principal sum or capital of the estate until his decease, or until he shall have wife or children capable of receiving the trust of the testatrix forfeited by him.

There does not seem, thus far any intention to secure or re-vest in the bankrupt any interest in the devise which he had forfeited; and there can be no doubt, that, but for the subsequent clauses of the will, there would be nothing in which the assignee could claim an interest. But there are the provisions, that the trustees may, at their discretion, transfer at any time to either of the devisees the half or any less proportion of the share of the fund itself which said devisee would be entitled to if the whole fund were to be equally distributed; and the further provision, that, after the cesser of income provided for in case of bankruptcy or other cause, it shall be lawful, but not obligatory on her said trustees, to pay to said bankrupt or insolvent son, or to apply for the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened.

It is strongly argued that these provisions are designed to evade the policy of the law already mentioned; that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt.

The two cases of *Twopeny v. Peyton* and *Godden v. Crowthurst*, above cited, seem to be in conflict with this doctrine; while the cases cited in appellant's brief go no further than to hold, that when there is a right to support or maintenance in the bankrupt, or the bankrupt and his family, a right which he could enforce, then such interest, if it can be ascertained, goes to the assignee.

No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee—a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt—confers such an interest on the latter, that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court.

As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding to its fullest extent the doctrine of the English courts,

their decisions are all founded on the proposition, that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain any thing more than a grant, to the trustees, of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not "in any manner obligatory upon them;" words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. *Hill, Tr.*, 486; *Lewin, Tr.*, 538; *Boss v. Goddall*, 1 Younge & C. Ch., 617; *Maddison v. Andrew*, 1 Ves., 60. And certainly they would not do so in violation of the wishes of the testator.

But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extreme doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property and the interests and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual frauds or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred

by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction.

It is believed that every State in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different States. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the States. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by state laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held that, as to contracts made thereafter, the exemptions were valid.

This distinction is well founded in the sound and unanswerable reason that, since the creditor knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment, he is neither defrauded nor injured by the application of the law to his case. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust estates are recorded in public offices, where they may be inspected by everyone; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds his life estate or income, dividends or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows, that in creating a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.

Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent or one who loves another, and wishes to use his own property

in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived.

These views are well supported by adjudged cases, in the state courts, of the highest character.

In the case of *Fisher v. Tylor*, 2 Rawle, 33, a testator had directed his executors to purchase a tract of land, and take the title in their name in trust for his son, who was to have the rents, issues and profits of it during his life, free from liability for any debts then or thereafter contracted by him. The Supreme Court of Pennsylvania held that this life estate was not liable to execution for the debts of the son. "A man," says the court, "may undoubtedly dispose of his land so as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust estate, explicitly designating the uses and defining the powers of the trustees. * * * Nor is such a provision contrary to the policy of the law or to any Act of Assembly. Creditors cannot complain because they are bound to know the foundation on which they extend their credit."

In the subsequent case of *Holdship v. Patterson*, 7 Watts, 547, where the friends of a man made contributions by a written agreement to the support of himself and family, the court held that the installments which they had promised to pay could not be diverted by his creditors to the payment of his debts; and Gibson, *O. J.*, remarks, that "The fruit of their bounty could not have been turned from its object by the defendant's creditors, had it been applicable by the terms of the trust to his personal maintenance; for a benefactor may certainly provide for the maintenance of a friend, without exposing his bounty to the debts or imprudence of the beneficiary."

In the same court, as late as 1864, it was held that a devise to a son of the rents and profits of an estate during his natural life, without being subject to his debts and liabilities, is a valid trust; and, the estate being vested in trustees, the son could not alienate. *Shankland's Appeal*, 47 Pa. St., 113.

The same proposition is either expressly or impliedly asserted by that court in the cases of *Ashhurst v. Given*, 5 Watts & S., 323; *Brown v. Williamson*, 36 Pa. St., 338; *Still v. Spear*, 45 Pa. St., 168.

In the case of *Leavitt v. Beirne*, 21 Conn., 1, Waite, *J.*, in delivering the opinion of the court, says: "We think it in the power of a parent to place property in the hands of trustees for the benefit of a son and his wife and children, with full power in them to manage and apply it at their discretion, without any power in the son to interfere in that management, or in the disposition of it until it has actually been paid over to him by the trustees"; and he proceeds to argue in favor of the existence of this power, from the vicious habits or intemperate character of the son, and the right of the father to provide against these misfortunes.

In the case of *Nickell v. Handly*, 10 Gratt.,

386, the court thus expresses its view on the general question, though not, perhaps, strictly necessary to the judgment in that case: "There is nothing in the nature or law of property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relatives, according to the different conditions and wants of such relatives; nothing to prevent her from charging her property with the expense of food, raiment and shelter for such relatives. There is nothing in law or reason which should prevent her from appointing an agent or trustee to administer her bounty."

In the case of *Pope v. Elliott*, 8 B. Mon., 56, the testator had directed his executors to pay for the support of Robert Pope the sum of \$25 per month. Robert Pope having been in the Rocky Mountains until the sum of \$225 of these monthly payments had accumulated in the hands of the executors, his creditors filed a bill in chancery, accompanied by an attachment, to subject this fund to the payment of their debt.

The Court of Appeals of Kentucky say that it was the manifest intent of the testator to secure to Robert the means of support during his life to the extent of \$25 per month, or \$300 per year; and that this intent cannot be thwarted, either by Robert himself by assignment or alienation, or by his creditors seizing it for his debts, unless the provision is contrary to law or public policy. After an examination of the Statutes of Kentucky and the general principles of equity jurisprudence on this subject, they hold that neither of these are invaded by the provision of the will.

The last case we shall refer to specially is that of *Campbell v. Foster*, 85 N. Y. Court of Appeals, 361.

In that case it is held, after elaborate consideration, that the interest of a beneficiary in a trust fund, created by a person other than the debtor, cannot be reached by a creditor's bill; and, while the argument is largely based upon the special provision of the statute regulating the jurisdiction of the court in that class of cases, the result is placed with equal force of argument on the general doctrines of the Court of Chancery, and the right of the owner of property to give it such direction as he may choose without its being subject to the debts of those upon whom he intends to confer his bounty.

We are not called upon in this connection to say how far we would feel bound, in a case originating in a State where the doctrine of the English courts had been adopted so as to become a rule of property, if such a proposition could be predicated of a rule like this. Nor has the time which the pressure of business in this court authorizes us to devote to this case permitted any further examination into the decisions of the state courts. We have indicated our views in this matter, rather to forestall the inference, that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than because we have felt it necessary to decide it, though the judgment of the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them.

Other objections have been urged by coun-

sel; such as that the bankrupt is himself one of the trustees of the will, and will exercise his discretion favorably to himself. But there are two other trustees, and it requires their joint action to confer on him the benefits of this trust. It is said that one of them is mentally incompetent to act; but this is not established by the testimony. It is said also, that, since his bankruptcy, the defendant, Amasa, had actually received \$25,000 of this fund; and that should go to the assignee, as it shows conclusively that the objections to the validity of the will were well founded.

But the conclusive answer to all these objections is, that, by the will of decedent—a will which, as we have shown, she has a lawful right to make—the insolvency of her son terminated all his legal vested right in her estate, and left nothing in him which could go to his creditors, or to his assignees in bankruptcy, or to his prior assignee; and that what may have come to him after his bankruptcy through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully, and cannot now be subjected to the control of his assignee.

The decree of the circuit is, therefore, affirmed.

Cited—94 U. S., 526; 111 U. S., 546; 9 Blac., 201; 15 Bk. Reg., 521; 16 Bk. Reg., 328; 54 Iowa, 317; 37 Am. Rep., 208; 183 Mass., 172; 48 Am. Rep., 507.

SARAH ANN JACKSON, now SARAH ANN DORSEY, *Appt.*,
v.
SIMON JACKSON.

(See S. C., 1 Otto, 122-127.)

Property of married woman—invested for her own use—husband's rights.

1. Although the money which the wife had at her marriage and her subsequent earnings is the property of the husband, he may allow her to invest them for her own use, so as to be beyond his reach and control.

2. No presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another can arise, where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his wife, or a father for his child.

3. A divorce, decreed against the husband is not a sufficient reason for restoring to him any rights to the property thus settled upon the wife.

[No. 45]

Argued Nov. 16, 1875. Decided Dec. 6, 1875.

APPEAL from the Supreme Court of the District of Columbia.

This was a suit for divorce brought in the court below by the appellant, for alleged drunkenness and cruelty. The answer denied both charges. The defendant also filed a cross-bill, alleging adultery on the part of the plaintiff and also setting forth that the plaintiff holds in her name, title to certain real estate with improvements thereon, acquired with the money and earnings of the appellee. The cross-bill also prayed for a divorce, with conveyance of the real estate to the husband. The answer to the cross-bill denied the allegation of adultery, and set up that the wife purchased the land with money derived from her father, and built

the houses herself—mainly with that money, the rents of the first house, and money earned by the plaintiff; that she took the title in her own name, and has held and managed the same in her own right ever since. On the hearing, the court found that the husband was guilty of the cruelty as charged, that the wife was not guilty of adultery, and decreed a divorce to her; also that the plaintiff convey to the husband about one half of the real estate. From this last part of the decree the wife appealed to the General Term where the decree was affirmed. The wife then appealed to this court.

The case further appears in the opinion.

Messrs. A. G. Riddle and B. F. Butler, for appellant.

Messrs. William A. Meloy and Francis Miller, for appellee.

Mr. Justice Field delivered the opinion of the court:

The land in controversy in this case was purchased by the wife with money which she had previous to her marriage, given to her by her father. The buildings erected thereon were constructed partly with such money and partly with her subsequent earnings. The deed of the land was taken in her name; the contract for the houses was made by her alone with the builder; the policy of insurance upon the buildings was executed to her; and she paid the taxes upon the property. It is true that, at the date of the marriage and when the land was purchased and the improvements were made, the common law governed in the District of Columbia as to the rights of married women to the personal property possessed by them previous to their marriage, and not secured by a settlement or contract to their separate use, and as to their subsequent earnings. By that law, the money which the wife then possessed and her subsequent earnings belonged exclusively to her husband. They vested as absolutely in him as though the money had been originally his, and the earnings were the proceeds of his own labor and industry. This harsh rule of the common law was founded upon the idea, that, as the husband was bound by the marriage to support the wife and the rest of the family, he was entitled to whatever she possessed or subsequently acquired, which was available for that purpose—a rule which would have had some good ground for its existence, had it only applied when the money or earnings of the wife were necessary for that purpose. But, becoming absolutely the property of the husband, they were subject to his disposal without regard to the necessities of the family, and might be taken from them at the suit of his creditors. They partook of the condition and were subject to the fate of his separate property.

But though the money which the wife in the present case had at her marriage, and her subsequent earnings, must be regarded as the property of the husband, it was competent and lawful for him to allow her to invest them for her own use, so as to be beyond his reach and control. Being at the time free from debt, he could have taken whatever money she had, whether given to her or earned by her own labor, and purchased with it the land in controversy, and received the deed in her name. The invest-

ment would then have been an advancement for her benefit; a voluntary settlement upon her; and the subsequent application of her earnings to the construction of improvements would have equally been a legal disposition of them. The improvement of property settled upon the wife is not forbidden to the husband, if not made with a fraudulent intent; and the moneys used for that purpose do not interfere with any rights of existing creditors.

The law on the subject of post-nuptial settlements of this character is well settled, and will be found stated in numerous adjudications of the American courts. *Swan v. Picquet*, 4 Pick., 465; *Haskell v. Bakewell*, 10 B. Mon., 206. The doctrine of resulting trusts, arising where a conveyance is taken in the name of one person and the consideration is advanced by another, has no application to investments of this kind. Such trusts are raised by the law from the presumed intention of the parties, and the natural equity that he who furnishes the means for the acquisition of property should enjoy its benefits. But no presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another can arise where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his wife or a father for his child. The circumstance that the grantee stands in one of these relations to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, and to create a contrary presumption of an advancement for the grantee's benefit. *Murless v. Franklin*, 1 Swanst., 17; *Grey v. Grey*, 2 Swanst., 597; *Finch v. Finch*, 15 Ves., 50; *Guthrie v. Gardner*, 19 Wend., 414; *Perry, Tr.*, secs. 143, 144.

The case of *Sexton v. Wheaton*, 8 Wheat., 229, which arose in the District of Columbia, is a determination of this court upon the points here presented. There the husband had purchased a house and lot within the District, and taken the conveyance in the name of his wife, and afterwards improvements were made upon the property. Subsequent creditors, having obtained judgment against him, filed a bill to subject the property to its payment, contending that the conveyance to the wife was fraudulent and void as to them, and praying that, if the conveyance was sustained, the wife might be compelled to account for the value of the improvements. But the court held, *Mr. Chief Justice Marshall* delivering its opinion, that the husband at the time being free from debt, the conveyance to the wife was to be deemed a voluntary settlement upon her, which, not being made with any fraudulent intent, was operative and binding against subsequent creditors; and that the improvements upon the property stood upon the same footing as the conveyance itself, they being made before the debts were contracted. The *Chief Justice* observed that it would seem to be a consequence of that absolute power which a man possesses over his own property, that he might make any disposition of it which did not interfere with the existing rights of others; that such disposition, if it were fair and real, would be valid; and that the limitations upon this power were those only which were prescribed by law. The *Chief Justice* then proceeded to show that the law only limited this power when its exercise impaired the rights

of existing creditors; and that a voluntary settlement by a husband in favor of his wife could not be impeached by subsequent creditors, unless it was made to defraud them.

The present case is one much stronger than the case cited, for here there are no creditors complaining. It differs from the one cited in that the investment was made directly by the wife, instead of being made through the husband; but we do not perceive in this fact any valid objection to the legality of the transaction. There can be no doubt that she acted with his approval. Fifteen years of acquiescence in her holding the land in her name, and in making improvements thereon with her earnings, ought to be deemed satisfactory evidence of his original authorization of the investments. The amount paid for the land was only \$300 (less than one sixth of the sum received from her father), and the whole cost of the improvements for the fifteen years was only about \$2,000; and it does not appear that any third parties have been in any respect prejudiced by the investments, or have ever questioned their validity.

The divorce decreed was not of itself a sufficient reason for restoring to the husband any rights to the property thus settled upon the wife. That was granted for cruel treatment; and, whatever may be the power of the court over the property of parties upon the dissolution of the marriage relation, there was no call for its exercise in a case like the present.

The decree of the Supreme Court of the District, so far as it awards any portion of the property in controversy to the husband, and directs a conveyance by the wife to him, must be reversed; and it is so ordered.

Mr. Justice Davis, dissenting:

I agree to the legal propositions advanced by the court; but, in my opinion, the evidence in this case does not warrant the application that has been made of them.

It would serve no useful purpose to discuss the evidence, in order to show that it is so; and I shall, therefore, content myself with saying that it justified the conclusion reached by the court below, that the property should be divided between the parties. As the appeal only brought up the question of property rights, I am not at liberty to consider the merits of the decree for divorce.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, *Plff. in Err.*,

v.

THE TRUSTEES OF THE SIXTH PRESBYTERIAN CHURCH.

(See S. C., 1 Otto, 127-134.)

Error in the record—affidavits not part of the record—presumption as to error.

1. If the transcript does not show that any error exists in the record, the judgment must in all cases be affirmed, except where it appears that there has been a mistrial.

2. Affidavits in the transcript are not a part of the record unless they are embodied in an agreed statement of facts or bill of exceptions, or are made so by a demurrer to the evidence; and where they are not part of the record, an assignment of errors,

so far as the same depends upon the affidavits, presents no question for re-examination by this court.

3. Where the court below has unquestioned power to take a proceeding, the action of the court must be presumed to be correct, until the contrary is shown by evidence embodied in the record.

[No. 47.]

Argued Nov. 16, 1875. Decided Dec. 6, 1875.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. S. F. Phillips, Wayne McVeagh and Daniel Clarke, for plaintiff in error.

Messrs. J. A. Garfield and R. D. Mussey, for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

Compensation was claimed in this case by the Trustees of the Sixth Presbyterian Church of this District for injuries occasioned to their real property by the Railroad Company; and they made application to a justice of the peace in and for the District, representing that the Railroad Company "Have laid their tracks and are now running their trains along Sixth Street and in front of the property of said church, and have built and now occupy and use a depot building upon said Sixth Street and in the near vicinity of said church, to the great damage of the same."

Pursuant to that application the magistrate to whom it was addressed issued a warrant to the Marshal of the District, commanding him to summon a jury of twenty citizens of the District, possessing the qualifications therein described, to meet at said church building on the day therein named, to proceed to value, in accordance with law, the damages which the said church organization has sustained in consequence of the things done as aforesaid by said Company.

Two objections to the warrant were filed with the Marshal by the Railroad Company: (1) That the warrant requires the jury to value damages for causes which are not authorized by law. (2) That the form of the oath administered to the jury is not correct.

Enough appears to show that the objections did not prevail, and that the inquisition was taken; the jurors being first sworn by the Marshal that they would truly and impartially assess the damages, if any, the applicants may sustain by the laying of the track along Sixth Street by the Railroad Company; and that the jury assessed the damages sustained by the applicants, by reason of the Railroad Company laying their track along Sixth Street, at the sum of \$11,500. Due return of the proceedings was made by the Marshal, in which it also appears that both parties met at the time and place appointed, and that the Marshal duly certified the warrant and inquisition to the Supreme Court of the District, as required by law.

Two days later, the Railroad Company moved the court to quash the warrant and set aside the inquisition for the reasons following: (1) Because the warrant required the Marshal to summon a jury to assess damages not authorized by law. (2) Because the warrant required the Marshal to summon a jury to assess damages for the running of the Company's trains along Sixth Street and in front of the property of the

Church, and for having built and now occupying and using a depot building in the near vicinity of the Church. (3) Because the return of the Marshal shows that he did not administer to the jurors the oath required by law. (4) Because the Marshal permitted evidence to go to the jury to show that the property had been damaged by the use and occupation of the track by the Railroad Company, and by the smoke and noise arising from such occupation. (5) Because the jury, in assessing the damages, did not confine their inquiries to the question of appreciation and depreciation of the value of the property by reason of the laying of the track along Sixth Street.

Pending that motion, the plaintiffs suggested to the court that the law required that the inquisition should be confirmed at the session of the court held next after the same was filed, and moved the court that the cause be placed upon the calendar, and stand for hearing; and the court granted the motion, and placed the case on the trial calendar. Four days afterwards, the plaintiffs moved the court to confirm the award of the jury; and on the same day the defendants moved the court to strike the cause from the calendar for the want of jurisdiction to try the same, except on appeal.

Affidavits of their counsel were offered by the defendants to prove that the plaintiffs were permitted to give evidence to the inquisition against the objections of the Company, that the Church was greatly annoyed and injured by the location of the engine depot, in consequence of the smoke arising from the engines being wafted by the wind into the Church building, and also from the noise of the engines and the passing trains and the ringing of the engine bells. Two jurors also gave affidavits, which were also offered in evidence, to show that, in arriving at the conclusion, they took into consideration all the surrounding circumstances, such as the passing of trains in front of the Church, the danger in passing to and from the Church, the expense of removing to another location and the smoke and noise arising from the passing engines.

Seasonable objection was made by the plaintiffs to the admissibility of those affidavits; but the court overruled the objections, and the affidavits were introduced, and allowed to be read.

Hearing was had on the motion of the plaintiffs and on the motions of the defendants to strike the case from the calendar, and to set the inquisition aside. Both motions of the defendants were overruled; and the court, finding no error in the record, confirmed the inquisition and finding of the jury, and gave judgment in favor of the plaintiffs for the amount awarded. Neither party tendered any bill of exceptions, but the defendants sued out a writ of error, and removed the cause into this court.

Neither depositions nor affidavits, though appearing in the transcript of a common law court of errors, can ever be regarded as a part of the record, unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions. Matters of parol evidence in such a case can never be made a part of the record so as to become re-examinable in a court

of errors, unless it be in one of four ways: (1) By an agreed statement of facts. (2) By a bill of exceptions. (3) By a special verdict. (4) By a demurrer to the evidence; which latter mode is seldom or never adopted in modern practice.

Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and, in case of refusal to comply with such a request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the appellate court, as nothing of the kind can ever constitute the proper foundation for an assignment of error. *Suydam v. Williamson*, 20 How., 433 [61 U. S., XV., 980.]

Errors apparent in the record, it is true, are open to revision, whether the error be made to appear by bill of exceptions, or in any other legal manner. *Slacum v. Pomery*, 6 Cranch, 221; *Bennett v. Butlerworth*, 11 How., 669; *Garland v. Davis*, 4 How., 131.

When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the question of law to be revised, and put the facts on the record for the information of the appellate tribunal; and, if he omits to do so in any of the methods known in the practice of courts of errors, he must be content to abide the consequences of his own neglect.

Evidence, whether written or oral, and whether given to the court or the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial, and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law.

Viewed in the light of these suggestions, it is clear that it will not be necessary to give a separate examination to all the alleged errors of the court below in confirming the inquisition, and in rendering judgment for the plaintiffs. Sufficient has already been remarked to show that the affidavits constituting the whole basis of the theory of fact involved in the errors assigned, affecting the merits of the controversy, are no part of the record; and, consequently, the errors assigned are utterly destitute of any legal foundation.

Attempt is made to overcome that difficulty by the suggestion that the writ of error is addressed to the judgment, and that the office of the writ of error is to remove the judgment of the subordinate court into this court for re-examination, which is undoubtedly correct; but it is equally true, that, if the transcript does not show that any error exists in the record, the judgment must in all cases be affirmed, except where it appears that there has been a mistrial. *Minor v. Tillotson*, 1 How., 287; *Taylor v. Mor-*

ton, 2 Black, 484 [67 U. S., XVII., 278]; *Barnes v. Williams*, 11 Wheat., 415; *Carrington v. Pratt*, 18 How., 63 [59 U. S., XV., 267].

Inquisitions like the present one bear a strong analogy in many respects to the report or award of referees appointed under a rule of court, to whom is referred a pending action. Referees in such cases make their report to the court; and in such a case the report, unlike an award at common law, must be confirmed before the prevailing party is entitled to the benefit of the finding of the referees. When the report is filed in court, the losing party may file objections in writing to the confirmation of the report, and may introduce evidence in support of the objections; and it is well settled law, that the ruling of the court in overruling such objections is the proper subject of a bill of exceptions. *R. R. Co. v. Myers*, 18 How., 250 [59 U. S., XV., 382].

Doubts were expressed at one time whether a bill of exceptions could be claimed in such case; but the decision referred to removed every doubt upon the subject. *Strother v. Hutchinson*, 4 Bing. (N. C.), 88; *Ford v. Potts*, 1 Halst., 388; *Nesbitt v. Dallen*, 7 Gill & J., 507; *Townson v. Moore*, 9 Port., 187.

Evidence in support of the objections to the award was received in that case; and the judge overruled the objections, and embodied the testimony and his ruling in a bill of exceptions, reserving his opinion as to the regularity of the proceeding, and whether the judgment could be revised. Pursuant to the arrangement, the losing party in the court below sued out a writ of error; and this court sustained the writ of error, and decided that the equity of the statute, allowing a bill of exceptions in courts of common law of original jurisdiction, embraces all such judgments or opinions of the court that arise in the course of a cause which are the subjects of revision by an appellate court, and which do not otherwise appear on the record. *R. R. Co. v. Myers* [*supra*]; *Canal Co. v. Archer*, 9 G. & J., 481; *Walker v. R. R. Co.*, 8 Cush., 8.

Doubtless, other modes may be devised of accomplishing a revision of the legal questions in a case like the present; but the court does not find it necessary to pursue the inquiry, as all the court intends to decide is, that the affidavits in the transcript are not a part of the record, and that in such a case an assignment of errors, such as the one exhibited in this case, so far as the same depends upon the affidavits, presents no question for re-examination by this court.

Three other questions of a formal character must receive a brief consideration. They arise from certain preliminary objections made by the defendants, as follows: (1) That the warrant directed the Marshal to summon a jury to assess damages not authorized by law. (2) Because the Marshal did not administer to the jury the oath required by law. (3) They also denied the jurisdiction of the court below, because the case was not removed into that court by appeal from the special term.

By the warrant, it appears that the applicants represented to the magistrate that the Railroad Company had laid their tracks and are now running their trains along Sixth Street and in

front of the property of the applicants, and have built and now occupy and use a depot building on said street in the near vicinity of the Church; and the command to the Marshal is, that he should summon a jury of the number and described qualifications "To proceed to value, in accordance with law, the damages which the said church organization has sustained in consequence of the things done by said Company as aforesaid."

Properly construed, it is by no means certain that the warrant professes to confer any greater power than that conferred by the statute; as the express direction of the warrant is, that the jury shall proceed to value the damages in accordance with law; which phrase may well be regarded as a limitation upon the phrase, "in consequence of the things done by said company." Suppose, however, the terms of the warrant are more comprehensive than the words of the statute; still the court is of the opinion that it furnishes no sufficient cause to reverse the judgment, for the reason that the transcript furnishes no legal evidence that the excess of power conferred, if any, was ever exercised by the jury to the prejudice of the rights of the defendants. Nothing appears in the transcript upon the subject, except what is contained in the affidavits, and it has already been determined that the affidavits are not properly to be regarded as a part of the record. *Pomeroy v. Bk.*, 1 Wall., 600 [68 U. S., XVII., 641]; *Young v. Martin*, 8 Wall., 356 [75 U. S., XIX., 419]; *Coddington v. Richardson*, 10 Wall., 518 [77 U. S., XIX., 981].

Enough appears in the record to show that the jurors were duly sworn that they would truly and impartially assess the damages sustained by the applicants by the laying of the railroad tracks, taking into consideration the appreciation and depreciation of the property belonging to the Church. Seasonable objection was made to the form of the oath; but the objecting party did not point out in what respect it was erroneous to their prejudice, nor have they done so in the assignment of errors; which is all that need be said upon the subject.

Argument is hardly necessary to show that the third objection is without merit, as the course pursued is fully justified by the Act of Congress. 12 Stat. at L., 768.

Parties aggrieved by any order, judgment or decree made or pronounced at a special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term; but the same section provides that the justice holding the special term may, in his discretion, order any motion or suit to be heard in the first instance at a general term. Unquestioned power being shown to warrant the proceeding, the action of the court must be presumed to be correct until the contrary is shown by evidence embodied in the record. *Thompson v. Riggs*, 5 Wall., 676 [72 U. S., XVIII., 706].

Judgment affirmed.

Mr. Justice Bradley did not sit on the argument of this cause, and took no part in the decision.

GUSTAVE T. BEAUREGARD, *Plff. in Err.*,

v.

CHARLES CASE, RECEIVER OF THE FIRST
NATIONAL BANK OF NEW ORLEANS.

THOMAS P. MAY, *Plff. in Err.*,

v.

CHARLES CASE, RECEIVER OF THE FIRST
NATIONAL BANK OF NEW ORLEANS.

(See S. C., 1 Otto, 184-148.)

*Partnership, what is—division of profits—set-
offs—Louisiana law.*

1. All the conditions which are essential to the creation of a partnership are: provisions for a union of services and money, and a division of profits and losses.

2. The postponement of a division of profits does not alter the character of the agreement as one of partnership.

3. Personal debts can only be set off to each other when they are of the same personal character. A partnership debt cannot be offset or compensated by a demand of one individual member against the creditor.

4. By the law of Louisiana, under an ordinary partnership, no verdict is legal that finds any greater sum against each of the partners served than his proportional share of the indebtedness.

[Nos. 48, 406.]

Argued Nov. 17, 1875. Decided Dec. 6, 1875.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

Charles Case, Receiver of the First National Bank of New Orleans, sued G. T. Beauregard, Thomas P. May and Augustus C. Graham, as commercial partners, to recover an amount claimed for the Bank of \$237,008.89.

An account was kept with the Bank in the name of G. T. Beauregard, lessee, meaning lessee of the N. O. and Carrollton R. R., and this it was alleged was a partnership account. This account exhibited an over-

draft of \$72,008.89

The Bank held a promissory note signed by G. T. Beauregard, lessee, *per pro* T. P. May, which it was alleged had been discounted and placed to the credit of Beauregard 40,000.00

Also a draft of May upon Graham, never accepted, of 125,000.00

Which, being added, made the amount claimed, \$237,008.89

It was alleged that the two sums last mentioned had been placed to the credit of the account fraudulently by order of T. P. May, who was, on the first occasion, acting President, and on the second occasion, President of the Bank, and that these sums and the whole balance had been applied to partnership purposes. Graham was not served.

May filed a general denial, and also alleged that he was a discharged bankrupt.

The defense of Beauregard in substance was, that there was no partnership, and the account was not a partnership account, but the account of a special fund, for which Beaure-

gard was not personally responsible, arising as follows:

That Beauregard had taken a lease of the N. O. & C. R. R., with a view to enter into an agreement, which he afterwards entered into with May and Graham to this effect: that they were to furnish the amount of money necessary to carry out the enterprise, not exceeding \$150,000 each, and Beauregard was to be employed as manager at a salary of \$5,000 per annum; and this should continue until the profits of the road should repay the moneys furnished by May & Graham, with interest, after which the profits should be divided between and losses borne by the three parties; that it was agreed that the account should be kept in the First National Bank; and that, by agreement made between May & Graham and the Bank, the checks upon that account, if in excess of deposits, were to be paid, and such excess was to be advanced by the Bank upon the credit of May & Graham, and each of them exclusively, and the excess was so paid by virtue of that agreement, and not upon the credit or responsibility of Beauregard, but to and on the credit of May & Graham; and that the checks upon which the excess was paid were drawn by direction of May & Graham, and in accordance with the contract between the said May & Graham and the Bank.

And as to the \$40,000 credit, which was the proceeds of a promissory note to that amount drawn in the name of Beauregard, by May, Beauregard denied the authority of May to draw the same, or that the money went to the use of the said defendant, but alleged that it went to the use of May.

And he insisted that the debt, if any, was the debt of May; and further, that when this indebtedness existed, May had a balance in Bank to his individual credit of \$815,000; and that May was liable for the overdraft, and being then debtor and creditor, the debt, if any, as well for the overdraft as for the note and bill, was extinguished by operation of law.

Upon the trial of the cause, evidence being given to support these several matters of defense, the defendant asked two instructions:

1. If the jury shall find from the evidence that Thomas P. May is individually indebted to the First National Bank of New Orleans, in the sum claimed in the plaintiff's petition, for moneys obtained by him from the Bank upon his sole credit and responsibility, or by overdrafts upon said Bank, paid without the knowledge of the Board of Directors, and solely through the orders and control of said May, as President or leading director of said Bank, that said debt had matured at the date of plaintiff's appointment as receiver; and when, as preliminary thereto, the Bank was taken in charge by the agent of the Comptroller of the Currency; and that said May then owed no other debts to said Bank; and that at said dates the said Bank was indebted to said May in the sum of \$815,779, for a balance of his general deposit account which has never been paid; then the jury are instructed that the said debt sued for in this case was compensated and extinguished by the said indebtedness of the said Bank. Which charge the court refused to give, but gave it with this addition: provided, that said May was the sole

NOTE.—When a community of profits creates a partnership; exceptions. See note to Ward v. Thompson, 68 U. S., XVI., 249.

See 1 Otto

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debtor of the Bank; to which refusal of the court to charge as requested and to the charge as given, the counsel for the defendant then and there excepted.

2. If the jury shall find from the evidence that under the contract between T. P. May, A. C. Graham and G. T. Beauregard, said May & Graham were to furnish, at their own exclusive charge and responsibility, and as their equivalent for their interest in the profits of the road, the means to carry on the same under said lease; that after said means so furnished were repaid to them from the earnings of said road, the profits of the road were to be divided between them and Beauregard, until which time said Beauregard was to be paid a salary from the earnings of said road for his services in managing the same; and if the jury find that, in accordance with said contract, May did furnish for said road the amount claimed in this suit, which he obtained from the First National Bank; which debt then created has never been paid, and that the earnings of the road were never sufficient to pay the same or any part thereof, then the jury are instructed that G. T. Beauregard is not liable to plaintiff therefor, although the same was expended for the road, unless the jury find that he bound himself for the same, either expressly or by fair implication, arising from dealings by him with the Bank. But the court refused to charge as requested, but gave the charge with this addition: provided, the Bank had notice of the terms of said contract between said May, Graham and Beauregard, to which refusal, etc., etc.

The jury rendered a verdict against Beauregard and May severally, for one third of the amount claimed, and the court, in conformity therewith, entered judgment severally against each for one third of the amount claimed by the plaintiff.

Beauregard and May sued out separate writs of error: the petition of Beauregard filed some three months prior to that of May, alleging that May had been notified to join and had failed to do so.

Messrs. J. M. Carlisle & J. D. McPherson and *J. A. Campbell*, for plaintiffs in error.

Messrs. C. Case, in person, and *P. Phillips*, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

This was an action brought by the plaintiff, as receiver of the First National Bank of New Orleans, against the defendants, Beauregard, May and Graham, to recover a sum exceeding \$237,000, alleged to have been overdrawn from the Bank on their account. Three questions are presented by the record for our determination: first, whether the agreement entered into by the defendants on the 18th of April, 1866, created a copartnership between them in operating the New Orleans and Carrollton Railroad, by which the defendant, Beauregard, became liable with them for the partnership debts before their advances were reimbursed; second, whether if a copartnership were thus created, and the defendant, Beauregard, became from its commencement jointly liable with the other defendants, the indebtedness of the copartnership to the Bank was compensated

and extinguished by the indebtedness, at the time, of the Bank to the defendant, May; and, third, whether the verdict was defective in that it found against each defendant served only his proportional third of the whole partnership debt, instead of finding against these defendants the whole amount of the indebtedness.

The agreement of April 18, 1866, provided, on the one hand, that Beauregard should obtain in his own name, but for the joint account of the defendants, a lease of the railroad, and take charge of and control and manage it at a designated monthly salary, for their mutual benefit; and on the other hand, that May and Graham should furnish the money necessary, not exceeding for each the sum of \$150,000, to carry out the enterprise, to be re-imbursed with interest out of its annual net profits; and then declared that after the payment of the capital thus invested, and interest, the annual net profits, gains and increase should be equally divided between the parties, share and share alike; and that all losses, from bad debts or otherwise, should be equally borne between them. It designated in terms the contract as one of partnership, and declared that it should continue from the date of the lease of the railroad for the period of twenty-five years.

There was in this agreement all the essential conditions for the creation of a partnership—provisions for a union of services and money and a division of profits and losses. The postponement of a division of profits between the three partners until the capital advanced by two of them should be refunded, with interest, did not alter the character of the agreement as one of partnership, nor the liability of all the partners to third persons for debts contracted in the prosecution of its business. It was sufficient to create the partnership relation that profits to be ultimately divided between the parties were contemplated from their joint enterprise (Civil Code of 1870, art. 2811); and the agreement in fixing the commencement of the partnership determined the date of their joint liability.

The partnership belonged to that class of partnerships which is designated in the law of Louisiana as ordinary partnerships, as distinguished from those which are commercial. The latter are such as are formed for the purchase and sale of personal property as principals, or as factors or brokers, or for the carriage of personal property for hire in ships or other vessels. Ordinary partnerships embrace all other kinds, and they differ essentially from the former in the powers and liabilities of the several partners. That which is material in the present case is, that, in ordinary partnerships, each partner is only bound individually for his share of the partnership debts; but to that extent a debt contracted by one partner, even without authority from the others, binds them if it be proved that the partnership was benefited by the transaction. Civil Code of 1870, arts. 2872 and 2894. In the present case, there was evidence tending to show that the moneys overdrawn by Beauregard were applied to the purposes of the copartnership. The instruction presented by his counsel assumed that they were thus used; and, if such were the case, there can be no doubt of his liability for the same jointly with his partners, unless by the terms of the contract with them they were to furnish the moneys used on

their separate responsibility, and the Bank had notice of the contract at the time. The addition placed by the court to the instruction was, therefore, a just and proper qualification.

The indebtedness of the partnership to the Bank was in no respect affected by the attempted credit of the note of Beauregard, signed by May, for \$40,000, and the draft of May on Graham for \$125,000. These instruments were mere devices of May to show on the books of the Bank a reduction of the large amount which was overdrawn on the partnership account. They had at no time any existence as instruments of value entitled to credit at the Bank. The draft was never transmitted to New York, where Graham resided, and was never presented to him. The instruments never having been paid, the indebtedness of the partnership to the Bank remained as it existed previously.

2. That indebtedness was not compensated and extinguished by operation of law by the indebtedness at the time of the Bank to May, if such existed. Personal debts are only set off to each other, or compensated the one by the other, by operation of law, when they are of the same personal character. A partnership debt is not thus offset or compensated by a demand of one individual member against the creditor. There is no mutuality in such cases between the parties.

It is true, as already stated, that the members of an ordinary partnership, by the law of Louisiana, are only liable to their common creditor for their proportional part of the indebtedness of the partnership; and, in a suit by the creditor against the firm, a partner having an individual demand against the creditor may, by way of defense, or by exception, as it is termed in the practice of the State, offset or oppose the compensation of his demand to that of the creditor. But this is a very different thing from one partner attempting to offset or oppose the compensation of the personal demand of his associate to the claim of their common creditor. For this position we can find no authority in the Code of Louisiana or the decisions of its courts. In the present case, for example, the defendant, May, might have set up against the claim of the plaintiff his personal demand against the Bank, had he not previously disposed of that demand to the United States; but the defendant, Beauregard, could not set up that demand of May's in compensation of the Bank's claim against him for his share of the partnership indebtedness, any more than he could set up a similar demand of a stranger.

The instruction presented by his counsel assumed that the defendant, May, might have been individually indebted for the whole of the amount of the moneys obtained from the Bank for the joint enterprise, and asked, in that event, that the jury be charged that the debt in suit was compensated and extinguished by the indebtedness of the Bank to him. At the time this instruction was presented, the contract of partnership was before the court, with evidence tending to show that the moneys obtained had been expended for the joint enterprise. It thus appeared that there was or might be a joint liability of the partners to the Bank, whatever the extent of their individual liability for the same indebtedness. The qualification placed

by the court to the instruction was, therefore, a proper limitation upon the doctrine of compensation applicable to the case. If there was any liability on the part of May for the indebtedness of the firm, except as partner, it was a liability as surety; and there could be no compensation, by operation of law, between the demand of the Bank against him as surety and the indebtedness of the Bank to him personally.

3. The verdict and judgment do, it is true, vary from the prayer of the petition. That seeks a judgment against all the defendants *in solido* for the whole amount of the partnership debt. It is based upon the hypothesis that the defendants were commercial partners, and were thus jointly and severally liable for the whole amount of the partnership debts. But the facts alleged by the pleadings and disclosed by the proofs showing that the partnership between the defendants was not a commercial one within the law of Louisiana, but one there designated as an ordinary partnership, no verdict would have been legal that found any greater sum against each of the partners served than his proportional share of the indebtedness. Code of 1870, art. 2086. There was in this no such departure from the issues made as to vitiate the verdict and judgment thereon. The reported decisions of the Supreme Court of Louisiana show numerous instances where similar verdicts upon like petitions have been sustained.

Judgment affirmed.

FAXTON D. ATHERTON ET AL., EXRS. OF
THOMAS S. PAGE, Deceased, *Plffs. in Err.*,

v.

JOHN FOWLER ET AL.

(See S. C., 1 Otto, 143-149.)

Jurisdiction over state judgments—to what State Court a writ of error must be sent—amendment and test of writ.

1. This court can only re-examine the final judgment or decree in any suit of the highest court of a State in which a decision in the suit could be had.

2. If the highest court has, after judgment, sent its record and judgment to an inferior court, and no longer has them in its own possession, this court may send its writ of error either to the highest court or to the inferior court.

3. If the highest State Court can and will procure a return of the record and judgment from the inferior court, and send them to this court, no writ need go to the inferior court; but if it fails to do this, this court may itself send direct to the court having the record in its custody and under its control.

4. A writ of error may be amended by inserting the proper return day. It is no objection to the writ that it bears test on the day of its issue.

[No. 647.]

Submitted Nov. 15, 1875. Decided Dec. 6, 1875.

IN ERROR to the Supreme Court of the State of California.

On motion.

The case is sufficiently stated in the opinion. See, also, the report of the decision on the merits, 96 U. S., 513 (XXIV., this ed.)

NOTE.—What is "final decree" or judgment of state or other court from which appeal lies. See note to *Gibbons v. Ogden*, 19 U. S. (6 Wheat.), 448.

Mr. M. A. Wheaton, for defendants in error.

Mr. M. Blair, for plaintiffs in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The plaintiffs in error claimed title to the hay in controversy in this case in consequence of alleged rights acquired under the Act of Congress, passed March 3, 1863, entitled "An Act to Grant the Right of Preemption to Certain Purchasers on the 'Socol Ranch,' in the State of California." 12 Stat. at L., 808. The decision of the State Court was against their title. This presents a question within the jurisdiction of this court.

The judgment of the Supreme Court is the final judgment in the suit, within the meaning of the Act of Congress. R. S., 709. It reversed and modified the judgment below, and did not permit further proceedings in the inferior court, if the defendants consented to the modification directed as to the amount of damages. This consent has been given, as the record shows; and the judgment of the court below is the judgment which the Supreme Court directed that court to enter and carry into execution. The litigation was ended by the decision of the Supreme Court. No discretion was left in the court below if the required consent was given.

The writ of error was properly directed to the Supreme Court of the State. We can only re-examine the "final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had." R. S., sec. 709. For the purposes of such a re-examination, we require the record upon which the judgment or decree was given, and we send out our writ of error to bring it here. That writ is to operate on the court having the record, and not upon the parties. *Cohens v. Virginia*, 6 Wheat., 410. The citation goes to the parties and brings them before us. The writ of error, therefore, is properly "directed to the court which holds the proceedings as part of its own records and exercises judicial power over them." *Hunt v. Palao*, 4 How., 590. If the highest court of the State retains the record, the writ should go there, as that court can best certify to us the proceedings upon which it has acted and given judgment. As it is the judgment of the highest court that we are to re-examine, we should, if we can, deal directly with that court, and through it, if necessary, upon the inferior tribunals. It is, perhaps, safe to say that a writ will never be dismissed for want of jurisdiction, because it is directed to the highest court in which a decision was and could be had. We may be able in all cases to reach the record by such a writ, and may be compelled to send out another to a different court before our object can be accomplished; but that is no ground for dismissal. We have the right to send there to see if we can obtain what we want.

But, in some of the States—as, for instance, New York and Massachusetts—the practice is for the highest court, after its judgment has been pronounced, to send the record and the judgment to the inferior court, where they thereafter remain. If in such a case our writ should be sent to the highest court, that court might with truth return that it had no record

of its proceedings and, therefore, could not comply with our demand. Upon the receipt of such a return, we should be compelled to send another writ to the court having the record in its possession. It has been so expressly decided in *Gelston v. Hoyt*, 3 Wheat., 246, and *McGuire v. Com.*, 3 Wall., 382 [70 U. S., XVIII., 164]. So, too, if we are in any way judicially informed, that, under the laws and practice of a State, the highest court is not the custodian of its own records, we may send to the highest court and seek through its instrumentality to obtain the record we require from the inferior court having it in keeping, or we may call directly upon the inferior court itself. But if the highest court is the legal custodian of its own records, and actually retains them, we can only send there. This, we think, has always been the rule of practice, notwithstanding *Mr. Justice Story*, in delivering the opinion of the court in *Gelston v. Hoyt*, said that the writ might be "directed to either court in which the record and judgment on which it is to act may be found." 3 Wheat., 304. This was in a case where the judgment had been rendered in the Court of Appeals of New York, but, after its rendition, the record with the judgment had been sent down to the inferior court, there to be preserved in accordance with the law and uniform practice in that State. Strictly speaking, the record cannot be found in two courts at the same time. The original record may be in one and a copy in another, or one court may have the record and another the means of making one precisely the same in all respects; but the record proper can only be in one place at the same time.

In *Webster v. Reid*, 11 How., 457, the general language of *Mr. Justice Story* in *Gelston v. Hoyt* was somewhat limited; for, in stating the ruling of the court in that case, *Mr. Justice McLean* gives it as follows: "The writ of error may be directed to any court in which the record and judgment on which it is to act may be found; and, if the record has been remitted by the highest court to another court in the State, it may be brought by writ of error from that court." To the same effect is *McGuire v. Com.* [*supra*]. That was a case from Massachusetts. The suit was pending in the Superior Court of that State; and, after verdict, but before judgment, certain exceptions were sent up to the Supreme Judicial Court for its opinion. That court subsequently sent down its rescript overruling the exceptions; and, thereupon, final judgment was entered in the Superior Court upon the verdict. This was according to the law and practice in Massachusetts, and the effect was to leave the entire record in the inferior court. Upon this state of facts, this court held that the judgment in that case was the judgment of the Superior Court, and that that court was the highest court in which the decision of the suit could be had, and, therefore, the only court to which the writ could go. But it was also held, that if the Supreme Judicial Court had rendered the final judgment, and had sent the judgment to the Superior Court, and with the judgment had sent the record, the direction of the writ to the Superior Court would have been proper. *Green v. Van Buren*, 3 Wall., 450 [70 U. S., XVIII., 245], was also a New York case, and is to be considered in the

light of the peculiar practice in that State. The record had been sent from the Court of Appeals to the Supreme Court.

The rule may, therefore, be stated to be, that if the highest court has, after judgment, sent its record and judgment in accordance with the law of the State to an inferior court for safe-keeping, and no longer has them in its own possession, we may send our writ either to the highest court or to the inferior court. If the highest court can and will, in obedience to the requirement of the writ, procure a return of the record and judgment from the inferior court, and send them to us, no writ need go to the inferior court; but, if it fails to do this, we may ourselves send direct to the court having the record in its custody and under its control. So, too, if we know that the record is in the possession of the inferior court and not in the highest court, we may send there without first calling upon the highest court; but if the law requires the highest court to retain its own records, and they are not in practice sent down to the inferior court, our writ can only go to the highest court. That court, being the only custodian of its own records, is alone authorized to certify them to us.

In this case, our writ went to the Supreme Court; and, in obedience to its command, that court has sent us its record. There is now no need of a further writ, even if the practice in California permitted the transmission of records from the Supreme Court to the inferior courts. But such, as we understand, is not the practice. The Supreme Court is there the sole custodian of its own records. Cases go there upon a transcript of the proceedings in the court below. This transcript is retained in the Supreme Court, and is the foundation of the proceedings there. The transcript is, without doubt, a copy of the proceedings in the court below; but that does not make the record below the record above. The court above acts only upon the transcript, and from that and proceedings thereon its record is made.

The writ of error may be amended under the authority of section 1005 of the Rev. Stat. by inserting the proper return day. It is no objection to the writ that it bears test on the day of its issue. R. S., secs. 912, 1005.

The motion to dismiss is denied.

FAXTON D. ATHERTON *et al.*, Exrs., etc., v. WELCOME FOWLER *et al.* [No. 648.]

The motion to dismiss this cause for want of jurisdiction is denied for the reasons stated in the opinion just read. The cases are, in all material respects, identical.

Cited—95 U. S., 87; 105 U. S., 702.

WILLIAM ROEMER, *Appt.*,

v.

EDWARD SIMON, SAMUEL SIMON, WILLIAM SIMON AND MORRIS SCHWERIN.

(See S. C., 1 Otto, 149, 150.)

Power of this court in equity cases—rehearing—when record may be returned to the court below.

See 1 Otto.

1. After an appeal in equity to this court, it cannot, upon motion, set aside a decree of the court below and grant a rehearing, but can only affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here.

2. The court below cannot grant a rehearing after the term at which the final decree was rendered.

3. Upon application to the court below for a rehearing, that court may send to this court a request for a return of the record, in order that it may proceed further with the cause, and this court, in a proper case and under proper restrictions, may make the necessary order, but cannot make such an order on the application of the parties.

[No. 483.]

Leave granted to file motion Nov. 1, 1875. Decided Dec. 6, 1875.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

Mr. Jonathan Marshall, for appellant.

Mr. F. H. Betts, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

This motion is denied. It is clear that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here. Rev. Stat., sec. 698. The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule, 88. It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing, and have that court send to us a request for a return of the record, in order that it might proceed further with the cause. Should such a request be made, we might, in a proper case and under proper restrictions, make the necessary order; but we cannot make such an order on the application of the parties. The court below alone can make the request of us. *The application of the parties must be addressed to that court, and not to us.*

Cited—95 U. S., 148.

GEORGE C. ROBERTS, *Appt.*,

v.

WILLIAM F. RYER.

(See S. C., 1 Otto., 150-159.)

New invention—what is not.

1. It is not a new invention to use an old machine for a new purpose.

2. A mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions or degree, doing substantially the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.

[No. 21.]

Argued Apr. 21, 22, 1875. Decided Dec. 13, 1875.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This case, No. 21, was commenced in the court below by Roberts, the appellant, for the alleged infringement of a patent of which he was

the assignee. The patent was granted to one Sanford, Nov. 18, 1855, for improvements in refrigerators. It was re-issued Apr. 21, 1857. Ryer, the defendant, was the licensee of one Lyman, who had received a patent in Mar. 1856. The chief defense relied upon was, that the invention of Lyman was prior to that of Sanford, and that the patent of Sanford being for the same invention, was consequently invalid.

The court below dismissed the bill, and the complainant appealed to this court.

The case further appears in the opinion.

Messrs. Thomas A. Jenckes and George F. Seymour, for the appellant.

Messrs. Frederick H. Betts and Causten Browne, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

In order that we may proceed intelligently in our inquiries as to the validity of the patent presented for our consideration in this case, it is important to ascertain at the outset what it is that has been patented.

Looking to the original patent, issued Nov. 18, 1855, we find the invention is there described as consisting "Of an improvement in refrigerators, whereby the whole of the contained air is kept in continual rotation, purification, desiccation and refrigeration, and with economy of ice;" and that the inventor claimed and obtained a patent for "the arrangement set forth for causing the perpetual rotation of the whole of the air contained within the refrigerating apartments, said arrangement consisting, when the refrigerator is closed, of an endless passage or chamber, the walls, shelves and ice receptacle of which are so placed and constructed that the air is compelled to circulate through the entire apartment or apartments, and from which the water of the melting ice is discharged immediately from the refrigerator, instead of flowing between its walls." Mention is nowhere made in the specifications attached to this patent of any advantage which the descending current of air has over the ascending. The whole apparent object of the inventor was to produce a circulation of the confined air without the introduction of external air. The drawings exhibit shelves perforated so as to permit the passage of the air in its downward and upward progress; but the shelves seem only to be alluded to in the specifications, for the purpose of indicating the necessity of their perforation, or of some equivalent arrangement, so as to allow the free transit of the air. They appear as part of the refrigerator to be improved, and are in no respect necessary for the accomplishment of the object the inventor had in view. Being in the refrigerator, they are perforated, or otherwise so arranged as to permit the circulation which the inventor is attempting by his device to create. But for this, they would prevent or at least interfere with the accomplishment of his object. The shelves themselves form no part of his improvement; but their perforation or its equivalent, when they are used, does.

In the re-issued patent, the invention is described precisely the same as in the old; and then the following is added: "It is well known that mould will not generate in a current of air; and it is known, that, when once formed, it pro-

pagates itself, and spreads with rapidity; therefore, if any one part of the refrigerator be out of the direct course of the circulation, the air will stagnate there, and will develop mould, which will contaminate the whole apartment. The apartment D may vary in width, and it may be * * * so narrow as to serve merely as a passage for the ascending current of air, the greatest benefit being always derived from the downward current in apartment C." This last paragraph certainly has much the appearance of an expansion of the original invention.

The claim, however, as made in the re-issue, is materially changed from that in the old. It is capable of division into three parts, and may be stated as follows:

1. The employment of an open-bottom ice-box, or its equivalent, in combination with a dividing partition, open above and below, so placed that by means of self-operating internal circulation the whole of the contained air shall be kept in motion, and caused to revolve around the partition in currents, moving downward only on one side of this partition, and upward only on the other side, when the same is combined with a chamber for the refrigeration of food, etc., placed directly under the ice-box.

2. Placing shelves or fixtures for holding articles to be refrigerated, or the articles themselves, in the descending current, directly under an open bottom ice-box, in combination with a dividing partition open above and below.

3. The construction of the open bottom ice-box in combination with the shelves or fixtures in such manner that the air may pass freely down through the same, and fall directly from the ice upon the articles to be refrigerated, while at the same time the drip of the water is prevented.

The patent is, therefore, for a combination of three elements—to wit: 1. An open-bottom ice-box, or its equivalent, so constructed that the air may pass freely down through it, while at the same time the drip of the water from the melting ice is prevented by collecting the water, and taking it in an escape-pipe outside of the refrigerator; 2. A dividing partition, open above and below, separating the refrigerator into two apartments; and, 3. A chamber directly under the open bottom ice-box, in which articles to be refrigerated may be placed in such manner as to receive the descending current of air from the ice-box directly upon them.

There is no doubt of the utility of this combination. If the patentee was its original and first inventor, the device was patentable to him.

It will be observed that no particular form of the opening in the bottom of the ice-box is essential. In fact, an equivalent may be used. It is so expressly stated. Any device which will allow of the passage of the cooled air out from among the ice, or cooling surfaces, into the chamber below, will come within the specifications. Hence the bottom may be in the form of a grate, or it may be constructed of bars running only longitudinally, or it may have one or many open spaces of any form. In this respect, all is left to the judgment of the builder. He may adopt any arrangement which he considers the best suited to the accomplishment of the object to be attained, which is the cooling

of the air by the ice, and its discharge into the chamber below. Neither is there any special requirement as to the manner in which the water from the melted ice is to be collected and conducted outside the refrigerator. It is said in the specifications, that the bottom of the ice-box was made funnel-shaped; but this was so that the water might be conducted to the central discharge, and from thence fall into the escape-pipe. This particular shape, however, is not made an essential ingredient. Any device that will collect the water in the discharge-pipe and prevent the drip will meet this requirement of the invention. So, too, of the escape-pipe; it may be of any desirable form. As little space as possible should be occupied, so that it may not obstruct the downward passage of the air; but even this is left as a matter of judgment alone.

Neither is any particular form of partition made essential. It need not even be vertical. All that is required is, that it shall be open at the top and bottom, and divide the refrigerator into two apartments. There are no specifications as to the size of the openings or their form, or as to the comparative size or form of the two apartments. It is said that the apartment for the ascending current may be so narrow, that it will serve only as a passage for the air; but there is nothing to prevent that for the descending current being narrow also, if the purposes of the refrigerator are such as to make that desirable. As the greatest benefit is generally to be derived from the use of the descending current, it is probable that this chamber will ordinarily be made as large as is consistent with a steady and continuous flow of the air; but, if a rapid descent is considered essential for any of the purposes of refrigeration, there is nothing to prevent a suitable contrivance for that purpose. If that can be accomplished by a larger chamber above leading into a smaller one below, for the purpose of concentrating the cold air current as it descends, a proper structure may be employed. If, in any place, the air descending from the ice-box can strike directly upon the articles to be refrigerated, the structure will be within the limits of the patent. It may be desirable to preserve the temperature at a lower degree until it strikes the article than it would be if permitted to remain in a chamber extending the whole size of the ice-box to the bottom of the refrigerator. In such case, a proper contrivance for that purpose may be employed. Shelves or other fixtures for holding the articles to be refrigerated are not necessary, as the articles themselves may be placed in the descending current without the aid of any fixtures. But, if they were, their particular form is not specified. A nail driven into the wall of the chamber would be a fixture within the meaning of this call of the specifications. All the specifications do require is, that, if shelves or fixtures are used, they shall be so constructed or placed as to interfere as little as possible with the free passage of the air.

Such being the patent, we now proceed to consider the defense; which is, that the invention patented had been anticipated by Asel S. Lyman and others. Sanford, the patentee, does not carry his invention back of the summer of 1855, when, it perhaps sufficiently appears, his application was filed.

See 1 Otto.

On the 21st September, 1854, Lyman filed his application for a patent for "A new and improved mode of cooling, drying and disinfecting air for ventilators and refrigerators." His improvement in refrigerators consisted "In so arranging them, that, as fast as the air became warm and moist and impure by contact with the meat, it is drawn off and passed through the material, where it is cooled, dried and disinfected, and then returned to use again in the refrigerator, collecting moisture and impurities, which it deposits in the receptacle intended for that purpose; thus keeping up a full circulation, and thoroughly ventilating the refrigerator with dry, pure, cold air."

His device consisted of a receptacle for ice, with a grate for its bottom, on which the ice rested. This receptacle was placed in the upper part of the refrigerator, and on one side. Below it was a cold-air chamber, into which the air flowed from the ice through the grate. The water from the melting ice was collected in this chamber, and conducted by a pipe to the outside of the refrigerator. From the cold-air chamber was a conduit leading downwards, but which did not extend to the bottom of the refrigerator. At the top of the ice receptacle, and on its side, was an opening into the refrigerator. The operation Lyman described to be as follows:

"The receptacle being filled with fragments of ice, the air among this ice will be cooled and, becoming more dense, will settle down through the grate into the cold-air chamber; thence down the conduit; and, so long as the air in the ice is colder and heavier than that in the refrigerator, it will continue to fall down the conduit, mingling with the lower strata, and forcing the upper strata or warmest air through the opening into the ice receptacle. When the air comes in contact with the cold surfaces of the ice, its capacity for moisture is lessened, and the moisture is deposited on the ice. By this arrangement of the ice receptacle in the upper part of the refrigerator, with an opening for receiving air in its upper part, and a grate in the lower part on which the ice rests, a cold-air chamber below the grate and a descending conduit from this cold-air chamber, or with an arrangement of parts substantially the same, so that the air shall be caused to circulate rapidly from bottom to top in the refrigerating chamber, and from top to bottom in the separate combinations as described, the air is not only cooled, but it is, by being frequently passed through the interstices of the ice, thoroughly dried, and it is washed as by a hail-storm; a decided improvement in its smell is effected; and the apparatus becomes not only cooling and drying, but, to some extent, a disinfecting apparatus."

He then claimed as his invention "The combination of the reservoir of cooling, drying and disinfecting material with the descending tube or conduit, so that the cold and condensed air in this conduit shall, on account of its increased weight, cause the warmer air to pass more rapidly through the material, where it is cooled, dried and disinfected, and in its turn fall down the conduit, being by its sides kept separate from the other air until it mingles with the lower strata, substantially as described for the purposes aforesaid."

There was, therefore, in this invention of

Lyman the refrigerator in box and the partition was made and below, during the refrigeration the ascending current is one of which the air passes downwards and is the other way. The construction of the box was of the "ice-box" type of "refrigerator" in the original patent. It was intended that the air in the box should be circulated through the entire apartment or apartments. True, the partition was not perfect, and the apartments need not be of equal or of any particular proportionate size. Such was not necessary, as has been seen in the original patent. Each, however, could be the circulation of air, and each obtained substantially by the same device. They each passed the air through the ice-box through conduits opening downwards in one apartment and upwards through the other. In each case the air passed through the opening in the bottom of the partition, and the warm air through that in the top. All this was done in both cases for the purpose of cooling, circulating, and purifying the confined air, and to prepare it for the purposes of refrigeration. There was, therefore, one common object to be accomplished by both the inventors, and they each devised substantially the same plan for that purpose.

Unmistakably, Lyman expected to use the ascending air principally for the purposes of refrigeration, and he therefore supposed the greatest benefit would be derived from that current; but there was nothing in his specifications to prevent the use of the descending air, or from so constructing his refrigerator as to make that available. If it should be thought advisable to extend the size of the chamber for the descending air, there was nothing to prevent it. It would still operate as a conduit in which the cold air would fall down and be kept separate by the sides from the other air until it mingled with the lower strata.

It being, then, certain that Lyman contrived a machine which would produce the desired circulation, and could be used for refrigeration in the ascending current, it remains only to consider, whether, if one desired to make use of the descending current for the same purpose, he could claim such use as a new invention.

It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not.

Lyman had the descending current. True, he concentrated the air as it fell, and sent it downwards through a space smaller than that which would be contained in a chamber extending the full size of the bottom of the ice-box to the bottom of the refrigerator; but he did have a space large enough to expose in it some articles to the effect of that current. If it should be found desirable to utilize that current to a greater extent than was at first contemplated, all that need be done is to enlarge the conduit. If the circulation is kept up, the device will be within the specifications. In fact, the proof is abundant, that in his experiments, while perfecting his invention, Lyman did, in more cases than one, utilize the descending current. With both the inventors, the circulation by means of an ascending and descending current was the principal object to be obtained. One considered

the greatest benefit for the purposes of refrigeration was to be derived from the use of the descending current, while the other had his attention directed more particularly to the advantages of the ascending. They each had both, and could utilize both. It is no invention, therefore, to make use of one rather than the other.

Lyman had conceived the idea of his invention as early as Aug. 19, 1852; for he then filed his claim in the Patent Office. His ideas were, at that time, undoubtedly crude; but it is clear that he kept steadily at his work. He built many refrigerators upon his general plan; and, in some at least, the descending current was made use of. A part had shelves arranged in such a manner as to expose the articles in that current and in some the articles were placed on the bottom of the refrigerator, immediately under the outlet of the conduit. In some the conduit was large, and in others it was small. The size was made in all cases to depend upon the judgment of the builder, and the purposes to which the machine, when completed, was to be applied.

As has been seen, Lyman, after having, as he thought, perfected his invention, applied for his patent, Sep. 21, 1854. Technical objections were made; and on the 19th April, 1855, he withdrew the application. He, however, still kept up his correspondence with the department, vigorously pushing his claim. On the 28th November, 1855, only thirteen days after the grant of the patent to Sanford, he filed a new application and, in doing so, distinctly connected it with the first. There certainly is no material difference between the old and the new. On the 25th March, 1856, a patent was in due form issued to him.

Down to this time, it is impossible to discover any material difference between the two patented inventions. Clearly Lyman was the oldest inventor, and his patent was, consequently, the best, although that of Sanford antedated his. His last application was rejected Dec. 5, because it had been anticipated by Sanford; but afterwards the subject was reconsidered, and a patent issued to him.

After this grant of a patent to Lyman, Sanford surrendered his original patent, and obtained his re-issue upon the amended specifications and claim. These have already been stated. All that can possibly be claimed for this amendment is a combination of the use of the descending current with the device for the circulation. There was no change in the machine: it was only put to a new use. If there was any change of construction suggested, it was only to increase its capacity for usefulness. It was "A mere carrying forward or new or more extended application of the original thought, a change only in form, proportions or degree, doing substantially the same thing in the same way, by substantially the same means, with better results." This is not such an invention as will sustain a patent. We so decided no longer ago than the last Term, in *Smith v. Nichols*, 21 Wall., 112 [88 U. S., XXII., 566]. Clearly, we think, therefore, the invention of Sanford was anticipated by Lyman, and his patent is, on that account, void.

We have been cited to the case of *Roberts v. Harnden*, 2 Cliff., 500, decided by Mr. Justice Clifford, upon the circuit, as an authority

against the view we have taken. In that case, the same construction substantially was given to the patent that we give to it here. We place our decision upon the facts shown to us. We think the evidence establishes, beyond all question, that Lyman, and not Sanford, was the original and first inventor of all there is of this improvement. In that case the court said "that the respondent had not introduced any satisfactory evidence tending to show that the patentee (Sanford) is not the original and first inventor of the improvement." What was submitted to that court we do not know. The report of the case does not contain the evidence, or any intimation of what it was.

Upon the evidence submitted to us, we think a clear case is made in favor of the defendants, and that the bill was properly dismissed.

The decree of the Circuit Court is affirmed.

Cited—110 U. S., 494.

GEORGE C. ROBERTS V. JOSEPH BUCK, JR.
[No. 46.]

Appeal from the Circuit Court for the District of Massachusetts.

[Argued by same counsel in connection with the preceding case and decided at same term.]

The decree of the Circuit Court in this case is affirmed for the reasons stated in the opinion just read. The questions presented in the two cases are substantially the same.

J. SHERMAN HALL ET AL., *Pliffs. in Err.*,
v.

RALPH A. LANNING ET AL.

(See S. C., 1 Otto, 160-171.)

Power of partner, after dissolution of firm—unauthorized appearance—judgment of State Court, how far may be questioned.

1. After the dissolution of a copartnership, one of the partners, in a suit brought against the firm has no authority to enter an appearance for the other partners, who do not reside in the State where the suit is brought, and have not been served with process.

2. A judgment against all the partners, founded on such an appearance, can be questioned by those not served with process, in a suit brought thereon in another State.

3. The jurisdiction of a court of another State over the person or the subject-matter embraced in the judgment or decree of such court, is always open to inquiry.

[No. 42.]

Argued Nov. 11, 1875. Decided Dec. 13, 1875.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. Samuel W. Packard and A. C. Packard, for plaintiff in error:

The general rule of law in New York is, that "Want of jurisdiction may always be interposed against a judgment when sought to be enforced, or when any benefit is claimed from it—the want of jurisdiction, either of the subject-matter, or of the person of either party, renders the judgment a mere nullity" there.

Kerr v. Kerr, 41 N. Y., 275; *Shumway v. Stillman*, 6 Wend., 447; *Borden v. Fitch*, 15

NOTE.—Effect of admissions of partner after dissolution, on his copartners. See note to *Thompson v. Bowman*, 73 U. S., XVIII., 736.

See 1 OTTO.

Johns., 121; *Dobson v. Pearce*, 12 N. Y., 104; *Kinnier v. Kinnier*, 45 N. Y., 542.

And for the purpose of showing that the court did not have jurisdiction, the recitals in the judgment record may be contradicted.

Adams v. R. R. Co., 10 N. Y., 332; *Harrington v. People*, 6 Barb., 607; *Latham v. Edgerton*, 9 Cow., 228.

But there is this exception to the general rule above stated in New York. Where an attorney has appeared without authority for a party, he cannot be allowed to dispute the authority of the attorney when the judgment is brought in question, except by a direct proceeding in the court where the judgment remains; and he cannot always do that, if the attorney is responsible, as a suit against the attorney is, under some circumstances, held an adequate remedy for him.

Brown v. Nichols, 42 N. Y., 26; *Denton v. Noyes*, 6 Johns., 296.

The reasons of the exception to the general rule in force in N. Y., do not apply to a suit upon such judgment record in another State.

The fact that a party has got to go to a distant forum outside the limits of his own State for redress, has frequently been held no adequate or sufficient remedy, and almost equivalent to no remedy at all.

Buckmaster v. Grundy, 3 Gilm. (Ill.), 626; *Tribble v. Taul*, 7 Mon., 455; *Green v. Campbell*, 2 Jones, Eq. (N. C.), 448; *Richardson v. Williams*, 8 Jones, Eq. (N. C.), 119; *Smith v. Field*, 6 Dana (Ky.), 364; *Taylor v. Stowell*, 4 Met. (Ky.), 176; *Ponder v. Cox*, 28 Ga., 306; *Key v. Robinson*, 29 Ga., 34; *Shish v. Foster*, 1 Ves., Sr., 88; *Edminson v. Baxter*, 4 Hayw. (Tenn.), 112; *Graham v. Tankersley*, 15 Ala., 644; *Hinrichsen v. Reinback*, 27 Ills., 301.

The evidence offered by Lybrand to show that the attorney who appeared for him did so without authority, does not contradict the record, but simply explains it, and Lybrand was not estopped from showing it.

Shelton v. Tiffin, 6 How., 186; *Gleason v. Dodd*, 4 Met. (Mass.), 338; *Borden v. Fitch*, 15 Johns., 121; *White v. Jones*, 38 Ills., 163; *Welch v. Sykes*, 3 Gilm. (Ill.), 200; *Hall v. Williams*, 6 Pick. (Mass.), 232; *Shumway v. Stillman*, 6 Wend., 447; *Aldrich v. Kinney*, 4 Conn., 380, and cases cited therein; *Harshey v. Blackmarr*, 20 Ia., 162, and cases cited; *Wilson v. Bk.*, 6 Leigh (Va.), 570; *Kerr v. Kerr*, 41 N. Y., 272; *Price v. Ward*, 1 Dutch. (N. J.), 229; Big. Estop., 226; 6 Rob. Pr., 438; 2 Am. L. Cas., 5th ed., 638, 642, and cases cited; Freem. Judg., sec. 563, 2d ed., p. 559.

The recitals in the record of a judgment of a sister State when sought to be enforced in another State, can be contradicted as to any jurisdictional fact, notwithstanding such recitals could not be contradicted in the State where the judgment was rendered, and notwithstanding the constitutional provision, "That full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State," and the Act of Congress passed to carry it into effect.

Thompson v. Whitman, 18 Wall., 457 (85 U. S., XXI., 897), and cases cited in the opinion of the court; *Knowles v. Gaslight Co.*, 19 Wall., 59 (86 U. S., XXII., 71); *Starbuck v. Murray*, 5 Wend., 148, per Marcy, J.; *Rape v.*

Heaton, 9 Wis., 328; *Kerr v. Kerr*, 41 N. Y., 272; *Shumway v. Stillman*, 6 Wend., 453; *Noyes v. Butler*, 6 Barb., 613; *Norwood v. Cobb*, 24 Tex., 551; *Carleton v. Bickford*, 13 Gray (Mass.), 591.

Mr. Sidney S. Harris, for defendants in error:

The question is presented, whether one partner, in a suit begun against himself and his copartner in regard to the partnership transactions which are within the scope of the partnership, the copartner being absent from the State, can direct an attorney to defend the action for the firm, by denying the allegations in the complaint and pleading a counter claim.

The solution of the question depends much upon what is the foundation of partnership authority.

Partners are a commercial personality. Each partner in all things relating to the firm transactions, represents and acts for the firm.

Pars. Part., 2d ed., 171; *Greeley v. Wyeth*, 10 N. H., 16.

It is clear that one partner may make contracts for the firm, which not only will bind all the partners to the extent of partnership assets, but which may lead to a personal liability of his copartners. This ultimate individual liability of the partners is a necessary legal result of the exercise of the partnership authority by either partner.

The authorities support the contention that Hall could defend for the firm.

Winship v. Bk., 5 Pet., 561; Pars. Part. n. (marg.), 175; *Harrison v. Jackson*, 7 T. R., 208; *Bennett v. Stickney*, 17 Vt., 531; *Spalding v. Swift*, cited in 17 Vt., 533; *Taylor v. Coryell*, 12 Serg. & R., 250; Colly. Part., secs. 441, 678; Lindl. Part., 226; *Everson v. Gehrman*, 10 How. Pr., 301; *Gard v. Clark*, 29 Ia., 189; *Olwell v. McLaughlin*, 10 N. Y. Leg. Obs., 316.

The following cases in N. Y. are to the point, that where there is no collusion nor any dissent by the copartner at the time, one partner may defend for both, and are cited in *Everson v. Gehrman*, *supra*; *Lippman v. Joelson*, 1 Code (N. S.), 161, n.; *Hammond v. Harris*, 2 How. Pr., 115; *Crane v. French*, 1 Wend., 311, *Grazebrook v. McCreddie*, 9 Wend., 437; *Blodget v. Conklin*, 9 How. Pr., 442.

If it is claimed that an appearance by one partner for his copartner, in a suit brought against the firm, may result in a judgment against such copartner, we answer that such a claim is insufficient to deprive the partner making such appearance of authority to make the same. It is clear that one partner has power to represent both himself and his copartner in all matters within the scope of the partnership. This power to contract necessarily carries with it the power to create a contract liability against both partners. If a suit is brought upon such contract by the other party to the same, why cannot either partner enter an appearance for both, for the purpose of defending the suit *bona fide*?

The liability is a partnership liability. Hall & Lybrand are a commercial personality, and each partner is liable *in solido*. *Mason v. Eldred*, 6 Wall., 231 (73 U. S., XVIII., 783).

It is claimed by the plaintiffs in error that Lybrand lived out of the State of New York at

the time suit was pending there. This gave Hall an authority to appear for Lybrand as well as for himself.

Bennett v. Stickney, 17 Vt., 531; *Coles v. Gurney*, 1 Madd., 187; *Carrington v. Cantillon*, Bunb., 107; Colly. Part., sec. 441.

If the partnership was dissolved, Hall still had the power to appear for the firm.

Wood v. Braddick, 1 Taunt., 104; per Lord Mansfield; *Pritchard v. Draper*, 1 Rus. & M., 191; *Vinal v. Burritt*, 16 Pick., 401; *Bridge v. Gray*, 14 Pick., 55; *Simpson v. Geddes*, 2 Bay., 533; *Garland v. Agee*, 7 Leigh, 362; *Woodworth v. Downer*, 13 Vt., 522; *Darling v. March*, 22 Me., 184; *Ido v. Ingraham*, 5 Gray, 106; *King v. Smith*, 4 Carr. & P., 108; *Huntington v. Potter*, 32 Barb., 800.

The plaintiffs had the right to rely upon the appearance of Ackley, the attorney; and such appearance is binding on the defendants, unless fraud or collusion is shown.

Grazebrook v. McCreddie, 9 Wend., 439; *Post v. Haight*, 1 How. Pr., 171; *Brown v. Nichols*, 42 N. Y., 27; *Hamilton v. Wright*, 37 N. Y., 502; *Jackson v. Stewart*, 6 Johns., 34; *Republic Mexico v. De Arangoiz*, 5 Duer, 643.

The general rule, that the appearance of an attorney for defendant is always deemed sufficient for the opposite party and for the court, is sustained by universal consent of the courts in this country.

Tally v. Reynolds, 1 Ark., 99; *Hayes v. Shattuck*, 21 Cal., 51; *Dalton City v. Dalton Mfg. Co.*, 33 Ga., 243; *Williams v. Butler*, 35 Ill., 544; *Harris v. Galbraith*, 43 Ill., 809; *State v. Carothers*, 1 Greene (Iowa), 454; *Succession of Patrick*, 20 La. Ann., 204; *Kent v. Richards*, 3 Md. Ch., 392; *Beckley v. Newcomb*, 24 N. H. (4 Fost.), 359; *Norris v. Douglass*, 5 N. J. L. (2 South), 817; *Jackson v. Stewart*, 6 Johns., 34; *Henck v. Todhunter*, 7 Har. & J. Md., 275; *Harding v. Hull*, 5 Id., 478; *Munnikuyson v. Dorsett*, 2 Har. & G. Md., 374; *Hills v. Ross*, 3 Dall., 331.

Mr. Justice Bradley delivered the opinion of the court:

This was an action of debt brought on a judgment rendered in New York against the plaintiffs in error. One of them, Lybrand, pleaded separately *nul tiel record*, and several special pleas questioning the validity of the judgment as against him for want of jurisdiction over his person. On the trial, the plaintiff simply gave in evidence the record of the judgment recovered in New York, which showed that an attorney had appeared and put in an answer for both defendants, who were sued as partners. The answer admitted the partnership, but set up various matters of defense. The cause was referred, and judgment given for the plaintiffs. This was the substance of the New York record. The plaintiffs gave no further evidence.

Lybrand then offered to prove that he never was a resident or citizen of the State of New York; and that he had not been within said State of New York at any time since, nor for a long time before, the commencement of the suit in which the judgment was rendered, upon which the plaintiff in this case brought suit; and that he never had any summons, process, notice, citation or notice of any kind, either actual or constructive, ever given or served upon him;

and that he never authorized any attorney or any other person to appear for him; and that no one ever had any authority to appear for him in said suit in the State of New York, or to enter his appearance therein, nor did he ever authorize anyone to employ an attorney to appear for him in the action in which said judgment was entered; and that he never entered his appearance therein in person; and that he knew nothing of the pendency of said suit in the said State of New York, until the commencement of the present suit in this court; that said Lybrand was a partner in business with said J. Sherman Hall at the time the transaction occurred upon which the plaintiffs brought suit in New York, though said partnership had been dissolved, and due notice thereof published, some six months prior to the commencement of said suit in New York.

This evidence, being objected to, was overruled by the court, which instructed the jury as follows: "That the record introduced in evidence by the plaintiffs was conclusive evidence for the plaintiffs to maintain the issues submitted to the jury by the pleadings; and that they should return a verdict for the plaintiffs, and against both defendants."

A bill of exceptions was taken to this ruling, and the matter brought here on writ of error.

The question to be decided in this case is, whether, after the dissolution of a copartnership, one of the partners in a suit brought against the firm has authority to enter an appearance for the other partners who do not reside in the State where the suit is brought, and have not been served with process; and, if not, whether a judgment against all the partners, founded on such an appearance, can be questioned by those not served with process in a suit brought thereon in another State. We recently had occasion, in the case of *Thompson v. Whitman*, 18 Wall., 457 [85 U. S., XXI., 897], to restate the rule, that the jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry; and that, in this respect, the court of another State is to be regarded as a foreign court. We further held in that case, that the record of such a judgment does not estop the parties from demanding such an inquiry. The cases bearing upon the subject having been examined and distinguished on that occasion, it is not necessary to examine them again, except as they may throw light on the special question involved in this cause. In the subsequent case of *Knowles v. Gastlight Co.*, 19 Wall., 58 [86 U. S., XXII., 70], we further held, in direct line with the decision in *Thompson v. Whitman*, that the record of a judgment showing service of process on the defendant could be contradicted and disproved.

It is sought to distinguish the present case from those referred to, on the ground that the relation of partnership confers upon each partner authority, even after dissolution, to appear for his copartners in a suit brought against the firm, though they are not served with process, and have no notice of the suit. In support of this proposition, so far as relates to any such authority after dissolution of the partnership, we are not referred to any authority directly in point; but reliance is placed on the powers of

partners in general, and on that class of cases which affirm the right of each partner, after a dissolution of the firm, to settle up its business. But, in our view, appearance to a suit is a very different thing from those ordinary acts which appertain to a general settlement of business, such as receipt and payment of money, giving acquittances, and the like. If a suit be brought against all the partners, and only one of them be served with process, he may undoubtedly, in his own defense, show, if he can, that the firm is not liable, and to this end defend the suit. But to hold that the other partners, or persons charged as such, who have not been served with process, will be bound by the judgment in such a case, which shall conclude them as well on the question, whether they were partners or not when the debt was incurred, as on that of the validity of the debt, would, as it seems to us, be carrying the power of a partner, after a dissolution of the partnership, to an unnecessary and unreasonable extent.

The law, indeed, does not seem entirely clear that a partner may enter an appearance for his copartners without special authority, even during the continuance of the firm. It is well known that, by the English practice, in an action on any joint contract, whether entered into by partners or others, if any defendant cannot be found, the plaintiff must proceed to outlawry against him before he can prosecute the action; and then he declares separately against those served with process, and obtains a separate judgment against them, but no judgment except that of outlawry against the defendant not found. 1 Chit. Pl., 42; Tidd, Pr., ch. VII., p. 423, 9th ed. A shorter method by *distringas* in place of outlawry has been provided by some modern statutes, but founded on the same principle. Now, it seems strange that this cumbrous and dilatory proceeding should be necessary in the case of partners, if one partner has a general authority to appear in court for his copartners. On the basis of such an authority, had it existed, the courts, in the long lapse of time, ought to have found some means of making service on one answer for service on all. But this was never done. In this country, it is true, as will presently be shown, legislation to this end (applicable, however, to all joint debtors) has been adopted; but it is generally conceded that a judgment based on such service has full and complete effect only as against those who are actually served. Further reference to this subject will be made hereafter.

It must be conceded, however, that the general authority of one partner to appear to an action on behalf of his copartners, during the continuance of the firm, has been asserted by several text-writers. Gow, Part., 163; Colly. Part., sec. 441; Pars. Part., 174, n. But the assertion is based on somewhat slender authority. We find it first laid down in Gow, who refers to a *dictum* of Sergeant Dampier, made in the course of argument (*Harrison v. Jackson*, 7 T. R., 207), and to the case of *Morley v. Strombom*, 8 Bos. & P., 254, where the court refused to discharge partnership goods taken on a *distringas* to compel the appearance of an absent partner, unless the partner who was served would enter an appearance for him. As to this case, it may be said that it is not improbable that the home partner had express authority to appear

in suits for his copartner, for, in a subsequent case (*Goldsmith v. Levy*, 4 Taunt., 299), a *distingas*, issued under the same circumstances, was discharged where the home partner made affidavit that the goods were his own, and that he had no authority to appear for his copartner. These seem to be the only authorities relied on.

But, as said before, these authorities and one or two American cases which follow them refer only to appearances entered whilst the partnership was subsisting; and it is pertinent also to add, that they only refer to the validity and effect of judgments in the State or country in which they are rendered.

Domestic judgments, undoubtedly (as was shown in *Thompson v. Whitman*), stand, in this respect, on a different footing from foreign judgments. If regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, though no process has been served and no appearance authorized, they will not necessarily be set aside; but the defendant will sometimes be left to his remedy against the attorney in an action for damages; otherwise, as has been argued, the plaintiff might lose his security by the act of an officer of the court. *Denton v. Noyes*, 6 Johns., 296; *Grazebrook v. M'Creddie*, 9 Wend., 437. But, even in this case, it is the more usual course to suspend proceedings on the judgment, and allow the defendants to plead to the merits, and prove any just defense to the action. In any other State, however, except that in which the judgment was rendered (as decided by us in the cases before referred to), the facts could be shown, notwithstanding the recitals of the record; and the judgment would be regarded as null and void for want of jurisdiction of the person.

So, it may well be that where an appearance has been entered by authority of one of several copartners on behalf of all, that the courts of the same jurisdiction will be slow to set aside the judgment, unless it clearly appears that injustice has been done; and will rather leave the party who has been injured by an unauthorized appearance to his action for damages.

There are many other cases in which a judgment may be good within the jurisdiction in which it was rendered so far as to bind the debtor's property there found, without personal service of process, or appearance of the defendant; as in foreign attachments, process of outlawry, and proceedings *in rem*.

Another class of cases is that of joint debtors, before alluded to. In most of the States legislative Acts have been passed, called Joint Debtor Acts, which, as a substitute for outlawry, provide that if process be issued against several joint debtors or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the States in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the State, but not the separate property of those not served; and, whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only

prima facie binding, on the latter. Under the Joint Debtor Act of New York, it was formerly held by the courts of that State that such a judgment is valid and binding on an absent defendant as *prima facie* evidence of a debt, reserving to him the right to enter into the merits, and show that he ought not to have been charged.

The validity of a judgment rendered under this New York law, when prosecuted in another State against one of the defendants who resided in the latter State, and was not served with process, though charged as a copartner of a defendant residing in New York, who was served, was brought in question in this court in December Term, 1850, in the case of *D'Arcy v. Retchum*, 11 How., 165. It was there contended that, by the Constitution of the United States, and the Act of Congress passed May 26, 1790, 1 Stat. at L., 122, in relation to the proof and effect of judgments in other States, the judgment in question ought to have the same force and effect in every other State which it had in New York. But this court decided that the Act of Congress was intended to prescribe only the effect of judgments where the court by which they were rendered had jurisdiction; and that, by international law, a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, if the defendant had not been served with process, or voluntarily made defense, because neither the legislative jurisdiction nor that of the courts of justice had binding force.

This decision is an authority which we recognized in *Thompson v. Whitman* and in *Knowles v. Gaslight Co.*, before cited, and which we adhere to as founded on the soundest principles of law; and, in view of this decision, it is manifest that many of the authorities which declare the effect of a domestic judgment, in cases where process has not been served on one or all of the defendants, and where those not served have not authorized any appearance and do not reside in the State, can have little influence as to the effect to be given to such a judgment in another State.

It appearing to be settled law, therefore, that a member of a partnership firm, residing in one State, cannot be rendered personally liable in a suit brought in another State against him and his copartners, although the latter be duly served with process, and although the law of the State where the suit is brought authorizes judgment to be rendered against him, the case stands on the simple and naked question, whether his copartners, after a dissolution of the partnership, can without his consent and authority implicate him in suits brought against the firm by voluntarily entering an appearance for him.

We are of opinion that no authority can be found to maintain the affirmative of this question.

In the case of *Bell v. Morrison*, 1 Pet., 351, this court decided, upon elaborate examination, that, after a dissolution of the partnership, one partner cannot by his admissions or promises bind his former copartners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt.

It is well settled by numberless cases, that, even before dissolution, one partner cannot confess judgment, or submit to arbitration as to

bind his copartners. *Stead v. Salt*, 3 Bing., 101; *Adams v. Bankart*, 1 Crompt., M. & R., 681; *Karhaus v. Ferrer*, 1 Pet., 222, and cases referred to in Story, Part., sec. 114; 1 Am. L. Cas., 5th ed., 556; Freem. Judg., sec. 282; Colly. Part., secs. 469, 470, and n.; Pars. Part., 179, n.

It is equally well settled, that, after dissolution, one partner cannot bind his copartners by new contracts or securities, or impose upon them a fresh liability. Story, Part., sec. 822; *Adams v. Bankart* (*supra*).

Appearance to a suit does impose a fresh liability. If there is no doubt of the validity of the demand, it places that demand in a position to be made a debt of record. If there is doubt of it, it renders the defendant liable to have it adjudicated against him, when, perhaps, he has a good defense to it.

On principle, therefore, it is difficult to see how, after a dissolution, one partner can claim implied authority to appear for his copartners in a suit brought against the firm. It may, in some instances, be convenient that one partner should have such authority; and, when such authority is desirable, it can easily be conferred, either in the articles of partnership or in the terms of dissolution. But, as a general thing, one can hardly conceive of a more dangerous power to be left in the hands of the several partners after the partnership connection between them is terminated, or one more calculated to inspire a constant dread of impending evil, than that of accepting service of process for their former associates, and of rendering them liable, without their knowledge, to the chances of litigation which they have no power of defending.

Few cases can be found in which the precise question had been raised. The attempt to exercise such a power does not appear to have been often made. Had it been, the question would certainly have found its way in the reports; for a number of cases have come up in which the power of a partner to appear for his copartners during the continuance of the partnership has been discussed. The point was raised in *Phelps v. Brewer*, 9 Cush., 890; but the court, being of opinion that the power does not exist even pending the partnership, did not find it necessary to consider the effect of a dissolution upon it.

In Alabama, where a law was passed making service of process on one partner binding upon all, it was expressly decided, after quite an elaborate argument, that such service was not sufficient after a dissolution of the partnership, and that acknowledgment of service by one partner on behalf of all was also inoperative as against the other partners. *Duncan v. Tombeckee Bk.*, 4 Port., 184; *Demott v. Swaim*, 5 Stew. & P., 293.

In the case of *Loomis v. Pearson*, Harp. (S. C.), 470, it was decided, that, after a dissolution of partnership, one partner cannot appear for the other; although it is true that it had been previously decided by the same court, in *Hast v. Street*, 2 McCord, 311, that no such authority exists even during the continuance of the partnership.

But the absence of authorities, as before remarked, is strong evidence that no such power exists.

See 1 OTTO.

In our judgment, the defendant, Lybrand, had a right, for the purpose of invalidating the judgment as to him, to prove the matter set up by him in his offer at the trial; and for the refusal of the court to admit the evidence the judgment should be reversed, with directions to award a *venire de novo*.

Judgment reversed.

Dissenting, *Mr. Chief Justice Waite, Mr. Justice Strong and Mr. Justice Hunt.*

Cited—30 Gratt., 279; 32 Am. Rep., 681.

RUFUS K. SEWALL, Admr. of HENRY CLARK, Deceased, *Appt.*,

v.

JOHN WINSLOW JONES ET AL.

(See S. C., 1 Otto, 171-199.)

Original inventor, who is—infringement, what is—another method.

1. To entitle a plaintiff to recover for the violation of a patent, he must be the original inventor, not only in relation to the United States, but to other parts of the world.

2. To constitute an infringement, the thing used by the defendant must be such as substantially to embody the patentee's mode of operation, and thereby to attain the same kind of result as was reached by his invention. The result need not be the same in degree.

3. A patent may be infringed, although the party does not follow the patentee's recommendation as to method, but accomplishes the same end by another method.

[No. 52.]

Argued Nov. 19, 1875. Decided Dec. 13, 1875.

APPEAL from the Circuit Court of the United States for the District of Maine.

The case is stated by the court.

Messrs. E. N. Dickerson and R. K. Sewall, for appellant.

Mr. W. H. Clifford, for appellees.

Mr. Justice Hunt delivered the opinion of the court:

Jones, as assignee of four several patents for a new and useful improvement in preserving Indian corn, brought his action against Clark, the original defendant, alleging infringements of the same. These patents were issued to Isaac Winslow, and were as follows, viz.: No. 84,928, dated April 8, 1862, "for a new and useful improvement in preserving Indian corn;" No. 85,274, dated May 13, 1862, "for a new and useful improvement in preserving green corn;" No. 85,846, dated May 20, 1862, and No. 86,826, dated Aug. 26, 1862.

The two patents last above mentioned were declared and adjudged by the court below to be void; and from this judgment no appeal has been taken. They are no longer elements in the case before us, and are dismissed from further consideration.

The patent first mentioned is for an article of manufacture—a result. The second one is for a process by which a result is obtained. The first is the more full, and embraces all that is contained in the second.

The first objection made to the patents is the want of novelty. It is contended that they were

anticipated by the Appert process embodied in the Durand patent of 1810; also by the patent of Gunter of 1841, and by that of Wertheimer of 1842. It is an elementary proposition in patent law, that, to entitle a plaintiff to recover for the violation of a patent, he must be the original inventor, not only in relation to the United States, but to other parts of the world. Even if the plaintiff did not know that the discovery had been made before, still he cannot recover if it has been in use or described in public prints, and if he be not in truth the original inventor. *Dawson v. Follen*, 2 Wash. C. C., 311; *Bedford v. Hunt*, 1 Mas., 302.

Durand's patent is described in his specification, enrolled in the English Court of Chancery, as based "Upon an invention communicated to him by a certain foreigner, residing abroad, of the manner of preserving animal food, vegetable food and other perishable articles a long time from perishing or becoming useless."

In describing the nature of the invention and the manner in which the same is to be performed, he says:

"First. I place the said food or articles in bottles of glass, pottery, tin or other metals or fit materials, and I close the aperture so as completely to cut off or exclude all communication with the external air;" and he describes the various means of effecting that purpose.

"Second. When the vessels are thus charged and well closed, I place them in a boiler, each separately surrounded with straw or wrapped in a coarse cloth, or otherwise defended from striking against each other. I fill the boiler so as to cover the vessels with cold water, which I gradually heat to boiling, and continue the ebullition for a certain time, which must depend upon the nature of the substances included in the vessels and the size of the vessels, and other obvious circumstances which will be readily apprehended by the operator. Vegetable substances are to be put into the vessel in a raw or crude state, and animal substances partly or half cooked, although these may also be put in raw."

The specification then declares that the inventor did avail himself of the application of heat by placing the vessel in an oven, stove, steam-bath or other fit situation for gradually and uniformly raising the temperature and suffering it to cool again, and that as the choice of the consumer or nature of the said food or other articles may render preferable, leave the aperture of the vessel, or a small portion thereof, open until the effect of the heat shall have taken place, at which period the same is to be closed.

The points following are embraced in this patent:

1. It is for the purpose of preserving for a long time animal or vegetable food.

2. The articles thus to be preserved are to be placed in tin or other vessels, so arranged as to exclude communication with the external air.

3. An aperture may be left in the vessel, at the choice of the operator, until the effect of the heat shall have taken place, when it is to be closed.

4. The vessels thus prepared are placed in a boiler filled with cold water, which is heated to a boiling point, which boiling shall be con-

tinued for such time as shall be required by the substances contained in the vessels.

5. Although a water-bath is preferred, the inventor declares that he avails himself of heat through an oven, stove, steam-bath or any other situation fit for gradually raising the temperature and suffering it to cool again.

6. Vegetables are to be put into the vessels in a raw or crude state; animal substances raw or partly cooked.

7. The invention is general in its terms, embracing all vegetables and all animal substances capable of being thus dealt with.

Winslow's patent of April 8, 1862, No. 34,928, is declared to be for an improvement in preserving Indian corn in the green state.

The letters patent declare that the first "Success of the inventor was obtained by the following process: the kernels, being removed from the cob, were immediately packed in cans hermetically sealed, so as to prevent the escape of the natural aroma of the corn or the evaporation of the milk or other juices of the same. I then submitted the sealed cans and their contents to boiling or steam heat for about four hours. * * * By this method of cooking green corn in the vapor of its juices, the ends of the cans are bulged out. Strong cans are required, and dealers are likely to be prejudiced against corn thus put up. I recommend the following method: select a superior quality of green corn in the natural state; remove the kernels from the cob by means of a curved and gauged knife, or other suitable means; then pack in cans, hermetically seal the cans, expose them to steam or boiling heat for about an hour and a half; then puncture, seal while hot, and continue the heat for about two hours and a half." At the close, the inventor says that what he claims to secure by the patent is the new article of manufacture, namely: Indian corn preserved in the green state without drying, the kernels being removed from the cob, hermetically sealed, and heated as described.

Let us now state the points embraced in this, the plaintiff's patent, and compare them with the points heretofore stated as included in the Durand patent.

1. Winslow's declared object is the preservation of Indian corn in the green state.

Durand's is for preserving Indian corn not only, but all vegetable substances in their raw or crude state.

2. Winslow recommends removing the kernels from the cob before the process of preservation is commenced, placing the kernels in cans, sealing them and exposing them to heat.

Durand, not limiting himself to the article of corn, provides that the articles to be preserved shall be placed in cans, and subjected to heat in the same manner. He does not stipulate or recommend that the article shall be first removed from the cob, the vine, the twig, or what ever may be the natural support of the vegetable to be preserved, as the corn from the cob, the pea from its pod, the grape or the tomato from its vine, the peach from its stem, the berry from its stalk. Neither does he recommend that it shall not be so removed. His process embraces the article in whatever form it may be presented. It is for the preservation of raw or crude or uncooked vegetables in whatever form they may

be presented, and necessarily includes a case where they have been previously removed from their natural support. A prior removal from the stalk would be the natural and, in many cases, a necessary proceeding.

3. Winslow directs that the kernels shall be subjected to the heat for a period of about one and a half hours before puncturing, and for about two and a half hours after the puncturing. The double use of the word "about" indicates that the time is not to be considered as precisely specified.

Durand directs that the boiling shall continue for such length of time as shall be required by the particular substances contained in the vessel. Corn, peas, tomatoes, peaches, berries, asparagus, may very likely require great difference in the time in which the heat shall be applied to produce the required effect. In each case, that is to be the measure of the time.

4. Winslow says other modes may be adopted so long as hermetical sealing and the use of heat are so managed as to secure the aroma and fresh flavor and prevent putrefaction.

Durand declares that he intends to include in his patent, heat through an oven, stove, steam or any other situation by which the temperature is gradually raised and suffered to cool again.

The same idea is put forth at the close of Winslow's specification, where he declares that what he claims by his patent is the manufacture of Indian corn in its green state, the kernels being removed from the cob, hermetically sealed and heated.

We are of the opinion that the substance of all that is found in Winslow's patent had, nearly half a century before he obtained his patent, been put forth in Durand's patent. If Durand's patent were now in force in this country, and a suit brought upon it against Jones, the claimant under Winslow, for an infringement, the right to recover could not be resisted. Durand would show a patent intended to effect the same purpose—to wit: the preservation of vegetables for a long time; employing the same process—to wit: the effect of heat upon vegetables placed in a metallic vessel, the gradual cooling of the same, hermetically sealed after puncture to allow the escape of gases. This is also Winslow's process.

To constitute an infringement, the thing used by the defendant must be such as substantially to embody the patentee's mode of operation, and thereby to attain the same kind of result as was reached by his invention. It is not necessary that the defendant should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be the same in degree; but it must be the same in kind. *Winans v. Denmead*, 15 How., 380.

To infringe a patent, it is not necessary that the thing patented should be adopted in every particular. If the patent is adopted substantially by the defendants, they are guilty of infringement. *Root v. Ball*, 4 McLean, 177; *Alden v. Dewey*, 1 Story, 336.

In an action for infringement, the first question is, whether the machine used by the defendant is substantially, in its principle and mode of operation, like the plaintiff's. If so, it is an infringement to use it. *Howe v. Abbott*, 2 Story, 190; *Parker v. Haworth*, 4 McLean, 370.

If he has taken the same plan and applied it

to the same purpose, notwithstanding he may have varied the process of the application, his manufacture will be substantially identical with that of the patentee. Curtis, sec. 812.

Erskine, J., says, in *Walton v. Potter*, Web. Pat. Cas., 585, 607, the question of infringement depends upon whether the plan which the defendant has employed is in substance the same as the plaintiff's, and whether all the differences which have been introduced are not differences in circumstances not material, and whether it is not in substance and effect a colorable evasion of the plaintiff's patent.

When a party has invented some mode of carrying into effect a law of natural science or a rule of practice, it is the application of that law or rule which constitutes the peculiar feature of the invention. He is entitled to protect himself from all other modes of making the same application; and every question of infringement will present the question, whether the different mode, be it better or worse, is in substance an application of the same principle. Curtis, sec. 320.

It is said, however, that a distinction exists in this: that Winslow's patent provides that the corn shall be removed from the cob before the process begins, and that Durand does not specify this idea. If this be conceded, it does not alter the case. Although he may preserve Indian corn by removing it from the cob more advantageously than by letting it remain on the cob, he does it by using the Durand process. He still applies Durand's process of heating, puncturing and cooling, and no more takes the practice out of Durand's patent than if he should specify that pears or peaches would be the better preserved if their outer coating should be first removed, or that meat could the better be preserved if the bones were previously extracted. Whether the improvement or combination could be the subject of a patent, it is not material to consider.

It is said again, that "instead of packing the kernels in the vessels selected for the purpose, in their crude state, as suggested in the English patent, the process patented by the assignor of the plaintiff directs that the kernels should be cut from the cob in a way which leaves a large part of the hull on the cob, and breaks open the kernels, liberating the juices, to use the language of the patentee, and causing the milk and other juices of the corn to flow out and surround the kernels as they are packed in the cans, in such a mode that the juices form the liquid in which the whole is cooked, when the cans are subjected to the bath of boiling water."

This argument is based upon an error in fact. There is no such language in the patent. The sole expression of the patent is to provide, first, that the corn shall be removed from the cob; and, second, that it shall be subjected to heat in vessels hermetically sealed. Thus, Winslow recites that difficulty had been encountered by him in preserving the corn upon the cob. This produced an insipid article; and accordingly he says, "My first success was obtained by the following process: the kernels, being removed from the cob, were immediately packed in cans and hermetically sealed, so as to prevent the escape of the aroma, and submitted to heat," etc. There is not a word in the patent to the effect that the kernels shall be cut off in a particular

way, or that a large part of the hull shall be left on the cob; nor, indeed, that the kernels shall be cut off at all. It is simply provided that the corn shall be removed from the cob. The means are not specified.

Farther on, the patentee, Winslow, says: "I recommend the following method." This is not of the substance of the patent. A recommendation is quite different from a requirement. The latter is a demand, an essential, a necessity. The former is a choice or preference between different modes or subjects, and is left to the pleasure or the judgment of the operator. He may adopt it. He will do well if he does. But he may reject it, and still accomplish his object by means of the patent.

The principle is this: the omission to mention in the specification something which contributes only to the degree of benefit, providing the apparatus would work beneficially and be worth adopting without it, is not fatal, while the omission of what is known to be necessary to the enjoyment of the invention is fatal. Curtis, sec. 248.

An excess of description does not injure the patent, unless the addition be fraudulent. Curtis, sec. 250.

Accordingly, when the inventor says, "I recommend the following method," he does not thereby constitute such method a portion of his patent. His patent may be infringed, although the party does not follow his recommendation, but accomplishes the same end by another method.

But the patentee does not even recommend that the kernels shall be cut off in such manner that a large portion of the hull shall remain upon the cob, nor does he distinctly recommend the cutting off of the kernels in any manner. His recommendation is simply that the kernels be removed by any convenient and suitable method. His language is, "I recommend the following method: select a superior quality of sweet corn in the green state, and remove the kernels from the cob by means of a curved and gauged knife or other suitable means." Any means that are suitable for removing the kernels, whether by knife or any other method, are within this language.

That the simple removal of the corn from the cob, before it is subjected to heat, without reference to cutting it off in such manner as to leave a portion of the hull on the cob, or without reference to cutting at all, is the claim of Winslow's patent, is clearly shown by another consideration.

The first patent of Winslow and his second patent, as stated in the opinion of the court below, are intended to effect the same purposes; the one being a patent for the article, the other for the process by which the article is produced. "Both patents (it is there said) may be considered together, as all the proofs applicable to one apply equally to the other; and the positions taken in argument are the same in both, without an exception."

Now, it is quite significant of the intent of the claimant, and of the meaning of the first patent, that his second patent, which is for the process, and would properly be more specific as to every essential mode, makes no claim that the corn shall be removed from the cob by cutting, much less that it should be cut in any par-

ticular manner, or with a view to any particular effect. After describing his disappointment in the result when he merely cooked the corn, and in attempting to preserve it when packed, without removal from the cob, or where it was removed after having been boiled on the cob, he says: "Finally, I adopted the process of removing the corn from the cob, packing the kernels in cans, hermetically sealing the same, then boiling the cans until the corn contained therein became completely cooked." The word "cutting" is not to be found in this patent. Removal from the cob before commencing the preservation, without reference to the manner or means except only that they should be suitable, is the plain intent of both patents. In this respect they are identical with each other, and are not inconsistent with Durand's patent.

The discovery in question has been of immense benefit to mankind. By means of food preserved in a compact and nutritious form, protected from its natural tendency to decay, deserts are traversed, seas navigated, distant regions explored. It is less brilliant, but more useful, than all the inventions for the destruction of the human race that have ever been known. It is to France that the honor of this discovery belongs, and to Appert, a French citizen. It does not belong to America or to Winslow. Appert's process presents all that we now know upon the subject. It contains absolutely everything of value that is contained in Winslow's patent.

Other grave questions are presented by the record before us. We are satisfied, however, to place our decision upon the ground that the want of novelty in the patents of Winslow is fatal to the plaintiff's right of recovery. We do not discuss the other questions.

The decree must be reversed, and a decree ordered in favor of the defendant below.

Mr. Justice Clifford, dissenting:

Damages are claimed in this case by the complainants for an alleged infringement of two certain letters patent, which are fully described in the bill of complaint. Those letters patent are as follows: (1) No. 84,928, dated April 8, 1862, for a new article of manufacture—namely: Indian corn when preserved in the green state, without drying the same, the kernels being removed from the cob, hermetically sealed, and heated, substantially in the manner and for the purpose set forth in the specification. (2) No. 85,274, for a new and useful improvement in preserving green corn.

Two other patents were included in the bill of complaint; but they were held to be invalid in the court below, and are not in issue in this investigation.

Both the patents in issue were introduced in evidence at the hearing, and the repeated decisions of this court have established the rule, that a patent duly issued, when introduced in evidence by the complainant in a suit for infringement, is *prima facie* evidence that the patentee is the original and first inventor of what is therein described as his invention.

Much consideration need not be given to the question of infringement, as the respondent admits that his foreman put up seven hundred cans of green corn, preserved by the same proc-

ess substantially as that described in the letters patent of the complainants.

Viewed in the light of these suggestions, it is clear that the decision of the case depends upon the defenses set up in the answer. Four separate defenses are pleaded but it will be sufficient to examine the first, as the decision of the court is placed chiefly on the defense set up in that part of the answer; which is, that the assignor of the patentee is not the original and first inventor of the improvements described in the respective letters patent.

1. Defenses involving the validity of a patent cannot be satisfactorily examined or their sufficiency or insufficiency determined without first ascertaining what the inventions are which are the subject-matter of the controversy. Beyond doubt, the invention secured by the first patent is for a new and useful manufacture described as Indian corn preserved in the green state. What the inventor desired to accomplish was to preserve the unripe corn in the green state for table use, without drying the same; and he states, that, in his first attempt to accomplish the desired result, he did not remove the kernels from the cob, but that the product manufactured in that mode was not satisfactory, as the article obtained was very bulky, and failed to retain the peculiar sweetness of green corn cooked in the ordinary way, the same being absorbed, as the patentee supposes, by the cob.

Experiments of various kinds were made to overcome the difficulties attending the effort to preserve the corn without drying the same, which were also unsuccessful, as the kernels when preserved did not retain the milk and other juices of the corn, leaving the product hard, insipid and unpalatable, and without the full flavor of fresh green corn. All such experiments were, therefore, abandoned; but he finally succeeded in producing an entirely satisfactory new article of manufacture, which is the one described in the specification and claim of the first patent.

His description of the method he adopted in manufacturing the product is substantially as follows: select a superior quality of sweet corn when in the milk or green state; remove the kernels from the cob by means of a curved and gauged knife or other suitable means; pack the kernels with the juices of the same in cans, and hermetically seal the cans, so as to prevent evaporation under heat, or the escape of the aroma of the corn. Other suitable means are such means, and such only, as will perform the same functions. When packed, the cans with their contents are to be exposed to steam or boiling heat for an hour and a half; then take the cans out of the steam or boiling heat and puncture the cans, and immediately reseal the same while hot, and continue the heat for two hours and a half longer.

Exposure to heat in the manner stated is for the purpose of cooking the contents of the cans; and, when that is accomplished, the cans may be taken out of the boiling heat, and be slowly cooled in a room at the temperature of seventy to a hundred degrees Fahrenheit. Green corn thus packed and treated, the patentee states, may be warranted to keep for an indefinite period in any climate. Being preserved in its natural state as near as possible, it retains the peculiar sweetness and flavor of fresh green corn

right from the growing field; and it is only necessary to heat the corn in order to prepare it for the table, as it is fully cooked in the process of preserving.

Argument to show that the commissioner may grant a patent for a product or new manufacture and one for the process is quite unnecessary, as that question is now firmly settled in favor of the power by the unanimous decision of this court. *Rubber Co. v. Goodyear*, 9 Wall., 788 [76 U. S., XIX., 566]; *S. C.*, 2 Cliff., 871; *Seymour v. Osborne*, 11 Wall., 559 [78 U. S., XX., 43]; *Goodyear v. Railroad Co.*, 2 Wall., Jr., 356; Curt. Pat., 4th ed., secs. 269, 327.

2. Pursuant to that rule, the second patent of the complainants was issued, which embodies an invention for a new and useful improvement in preserving green corn; or, in other words, the patented invention is for the process of manufacturing the new product described and secured to the inventor in the other letters patent.

Applicants for a patent are required to describe their respective inventions; but an invention for a product and an invention for the process to produce the product bear so close a relation to each other, that it is difficult even for an expert to describe the latter without more or less reference to the former. Defects of the kind, however, are of no importance, if the patent for the product contains no claim to the invention for the process.

Separate applications may be made in such a case; or the inventor, if he sees fit, may describe both inventions in one application. Accordingly, the patentee in this case presented only one application in the first place for both patents; but, pending the hearing in the Patent-Office, he filed separate specifications, the second containing some of the same phrases as those employed in the specification describing the invention of the new manufacture. Among other things, he admits that it has long been common to boil green or unripened corn, and then to dry the same for winter use; but he adds that corn thus dried must be boiled again when prepared for the table, and that it is more or less hard and insipid, as it loses the fine flavor of fresh green corn. Ears of corn also, he says, are sometimes boiled, and hermetically sealed in cans; but the cob seems to absorb the sweetness of the kernels; or if the kernels are removed from the cob after boiling, and then preserved, still the fine flavor of the natural corn is lost.

Many and varied attempts were made by the patentee to preserve green corn on the cob without drying the same; but all his efforts in that behalf were unsuccessful, as they left the article dry and unpalatable, as the sweetness of the green corn was absorbed by the cob. Experiments of the kind having all failed, he conceived the idea of first removing the corn from the cob, and then boiling or cooking the kernels, and preserving them as separated from the cob.

Some benefit, it seems, resulted from that new conception; but a new difficulty arose, from the fact, that, the kernels of corn being more or less broken in being removed from the cob, the milk and other juices of the corn were dissolved and diluted by the water in the process of boiling leaving the product insipid, unpalatable and comparatively tasteless.

Unable to overcome the difficulty in that mode, he next attempted to cook the corn without allowing it to come in contact with the water, by exposing the cans containing the corn to boiling water; but he soon found that that mode of preserving the corn was unsatisfactory, as a long time was required to cook the corn sufficiently for preservation, and the corn became more or less dried and hard.

Sufficient has already been remarked to show that both patents may be considered together, for the reason that all the proofs applicable to the patent for the product are equally applicable to the patent for the process, and the positions taken in argument are the same in both, without an exception.

Want of novelty is the principal defense set up in the answer; and the court decides that the respective patents are invalid, chiefly upon the ground that the foreign invention secured to Peter Durand is prior in date. Before examining that defense, it becomes necessary to refer somewhat more fully to the nature and peculiar characteristics of the respective improvements, in order that the evidence introduced may be correctly understood and properly applied.

Unripe ears of corn may be boiled and hermetically sealed in cans without infringing the inventions of the patentee; but the difficulty with that product is, that the cob absorbs the sweetness of the kernels, and the article becomes insipid and unpalatable and, consequently, it is not salable to any considerable extent. Sales of such a product do not infringe the patents of the complainants; and it is clear that the kernels may be removed from the cob, and then preserved in cans in the ordinary mode, without any conflict with the improvements embodied in the complainants' patents: but the product which such a process produces is comparatively valueless, as the fine flavor of green corn cooked in the usual way for table use is lost in the process of manufacture.

Indian corn may also be preserved when in a green state by removing the kernels from the cob, and boiling or cooking the same before the kernels are packed in cans hermetically sealed, without subjecting the manufacturer to the charge of infringing the patents described in the bill of complaint; but the decisive objection to that process is, that the kernels, or many of them, in being removed from the cob, are broken, and consequently the milk and other juices of the corn in that state are dissolved out in the process of boiling or cooking, and the natural aroma of green corn cooked in the usual way is lost, and the product becomes of little or no value as an article of commerce.

Attempts were made by the patentee in this case to remedy that difficulty by packing the kernels in cans not sealed, and exposing the cans containing the kernels to boiling water; but the experiments were not satisfactory, as it required a long time to cook the corn, during which the milk and other juices of the corn evaporated, and left the kernels dry and hard. All such experiments having failed, the inventor adopted the process of removing the corn from the cob by means of a curved and gauged knife and packing the kernels with the milk and other juices of the same in cans hermetically sealed, and then boiling the cans with their contents until the same became completely cooked; but

he states that the cans containing the corn must be very strong, or the internal pressure will cause them to burst; and, to prevent that, he practiced puncturing them after they became well heated, to allow the air to escape, immediately resealing the same to prevent the evaporation of the juices of the corn and the loss of its natural aroma.

Sealed cans, if sufficiently strong, it would seem, may be used to complete the process without the necessity of puncturing during the period they are exposed to the boiling bath; but, unless the cans are very strong, the recommendation is to puncture them, in order to relieve the internal pressure and to prevent them from bursting. Other advantages result from puncturing the cans which deserve consideration. Even if the cans when not punctured do not burst, still the air contained in the same and the vapor become more or less expanded by the heat, so as to press the heads of the can outward, giving the can the appearance of cans which contain gaseous products of decomposition; and the statement is, that such appearances, even when the corn is perfectly preserved, diminish the value of the product as an article of commerce, and show that it is better to puncture and reseal the cans during the process of boiling.

Looked at in any light, it is clear that the purpose of the invention secured by the second patent, as evidenced by the language of the description, is to preserve not only the farinaceous elements of the kernels, but also the milk and juices of the same which give the peculiar aroma or flavor to green corn when cooked for the table in the usual way, during the season when the kernel is full, but before the milk and juices of the kernel become concrete, as in ripe corn.

Beyond all doubt, the patented process, if the directions are properly followed, will accomplish the purpose for which it was invented, and will enable the manufacturer to preserve the kernels of the green corn, with all the milk and juices which the kernels contain, without any chemical or other change except what is produced by the cooking, which is effected by putting the sealed cans containing the kernels with their milk and other juices, just as the same were removed from the cob, by the curved and gauged knife, into the boiling water for the periods specified in the description of the specification.

Proof to that effect, of the most satisfactory character, is exhibited in the record; and the fact that the product of the patented process, to the extent that it has become known, has driven the product of all other processes intended to effect a like result out of the market, attests its accuracy and truth. Suffice it to say, that the remarks made are sufficient to explain and describe what the inventions are which give rise to the present controversy; and, having accomplished that purpose, the next inquiry is, whether the assignor of the complainants was the original and first inventor of the respective improvements.

Examined merely in the light of the pleadings, the affirmative of the issue is upon the complainants; but, the complainants having introduced the respective patents in question, the rule is well settled that the burden of proof is changed, and that it is incumbent upon the respondent to show by satisfactory proof that the

alleged inventor was not the original and first inventor of the respective improvements, as they have alleged in their answer.

Ample time was given to both parties in the circuit court to prepare for a hearing, and the respondents attempted to meet the issue in two ways.

8. Suppose it be true that the assignor of the complainants was the first person in the United States who practiced the patented process, and preserved green corn even in that mode of operation: still it is contended that the alleged inventor was not the original and first inventor of the improvement, because the process had been previously known and used in a foreign country; but the circuit court ruled and determined that the mere previous knowledge or use of a thing patented in a foreign country was not sufficient to defeat a patented invention granted under the Patent Act; that no evidence of the kind could have that effect, unless it appeared that the same invention had been previously patented in some foreign country, or been described in some public work, anterior to the supposed discovery thereof here by the alleged inventor; that it is well settled law, that the mere introduction of a foreign patent or a foreign publication, though of a prior date, will not supersede a domestic patent, unless the description of specifications or drawings contain or exhibit a substantial representation of the patented improvement in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which the invention appertains, to make, construct and practice the invention to the same practical extent as he would be enabled to do if the information was derived from a prior patent issued in pursuance of the Patent Act. *Seymour v. Osborn* [*supra*].

Unable to controvert those propositions, the respondent next refers to the English patent granted to Durand, and insists that it supercedes both of the patents of the assignor of the complainants. His patent bears date the 30th of August, 1810; and the specification states, in substance, that he incloses the food or articles to be preserved in bottles, or other vessels of glass, pottery, tin or other metals or fit materials, and closes the apertures of the vessels so as completely to cut off and exclude all communication with the external air. When the vessels have been thus charged and well closed, he places them in a boiler, each separately surrounded with straw or wrapped in coarse cloth, or otherwise defended from striking against each other. He then fills the boiler so as to cover the vessels with cold water, and gradually heats the water till it boils, and continues the ebullition for a certain time, which, as he says, must depend upon the nature of the substances and other obvious circumstances.

Vegetable substances, the specification states, are to be put into the vessels in the raw or crude state. Animal substances are to be partly or half cooked, although these may be put in raw; and he adds that articles thus prepared may be kept for a very long time and in a state fit for use; and no doubt is entertained that unripe corn prepared in that way may be kept for a long time, as it is evident that the kernels would be dried by the heat, but they would necessarily cease to have the flavor of fresh green corn. See 1 Otto.

when cooked in the usual way for table use. Confirmation of that is found in what immediately follows in the specification, which shows that the patentee also claims the application of heat in other modes, as by placing the vessels in an oven or a stove, the effect of which, beyond all doubt, would be to dry the kernels, and make it necessary to reboil the contents of the vessel in order to fit the same for table use.

Certain vegetable substances may, perhaps, be preserved to advantage in that way; but it is clear that the application of high heat to the vessels containing green corn, unless the kernels were surrounded by water or some other suitable liquid, would necessarily dry the kernels, and render them unfit for table use without soaking or reboiling. Doubtless the term "vegetable substances" is comprehensive enough to include green corn: but the patentee, in enumerating the articles to be preserved, does not mention green corn; and, of course, the specification contains nothing to indicate whether the kernels are or are not to be removed from the cob before they are placed in the bottles or other vessels; or, if to be removed, in what manner the removal is to be effected; nor whether the kernels are to be left whole or broken, as in the mode of operation described in the patents in question.

Corn at that period was unknown in England, and it is not probable that the patentee had ever heard of such an article, and it does not appear that a can of green corn has ever been preserved in that mode of operation to the present time. Patented inventions must be described so that those skilled in the art or science may be able to make, construct and practice the same; and yet it is plain that no amount of study or examination of the foreign specification would ever enable any person to preserve green corn in the mode of operation employed by the assignor of the complainants.

Study it as you will, and the conclusion must be that the vegetable substance, whatever it may be, is to be placed in the bottles or other vessels in the raw or crude state, without any previous preparation, and without any liquid to prevent the substance from drying. Indian corn on the cob, or unbroken kernels of green corn, cannot be preserved in that way so as to possess any commercial value.

Instead of packing the kernels in the cans in their crude state, the process patented by the assignor of the complainants directs that the kernels should be cut from the cob in a way which leaves the coarser part of the hull on the cob, and breaks open the kernels, liberating the juices, to use the language of the patentee, and causing the milk and other juices of the corn to flow out and surround the kernels as they are packed in the cans, in such a mode that the milk and juices of the kernels form the liquid in which the whole is cooked when the sealed cans are subjected to the bath of boiling water. Water is never added to the mixture to be preserved; nor is it necessary, as the liquid composed of the milk and juices of the kernels is sufficient to prevent the heat from drying the vegetable substance to be preserved; and, if water should be added, it would dilute the milk and other juices, and render the product insipid and valueless.

Evidently much is due to that feature in the

patented mode of operation in preserving the product in its natural state, and causing it to retain the sweetness, peculiar flavor and natural aroma of green corn fresh gathered from the field, and boiled in the usual way for table use. Nothing of the kind is suggested in the foreign patent, and it is clear that a careful comparison of the description of the complainants' patents with that of the Durand patent fully justifies the opinion of the learned expert examined by the complainants, that the two patented processes are essentially and substantially unlike, and confirms the conclusion already expressed, that persons having no other knowledge of the complainants' process than what they can derive from perusing the specification of the foreign patent would never be able to preserve green corn by the complainants' mode of operation.

Palpable as those differences are, they ought not to be overlooked in determining the issues between these parties. Meritorious inventors are entitled to protection; and the proofs are full to the point that the product, manufactured by the process of the complainants, is far superior to that preserved in any other mode; which, beyond all question, is the cause that induced the respondent to abandon other methods, and to practice the patented process at the risk of a suit for infringement.

Other vegetables, such as beets and carrots, or peas and beans, may be packed in cans in a crude state under the foreign process, as they retain their juices and may, perhaps, be tolerably well preserved in that mode of operation if entirely secluded from the atmosphere, as by packing ripe vegetables in hermetically sealed cans; but the chemical composition of such vegetables is very different from green sweet corn, which is much more difficult to preserve in its natural freshness without loss of its peculiar flavor and aroma, as accomplished by the complainants' process. When the kernels are cut from the cob, they are opened, and the milk and other juices flow out, and become the liquid in which the kernels are to be cooked, and the milk and the other juices become a constituent part of the vegetable substance to be preserved.

Prompt action is required to accomplish the object; for, if the mixture is exposed to the air for any considerable time before the cans are filled, the chemical relations of the constituents will be changed, and the whole substance will become sour and unwholesome. Exposure to heat, if seasonable, will prevent that tendency, as the relations of the constituents of which the mixture is composed will become fixed, and the danger of putrefaction or souring will be greatly diminished or be entirely averted.

Throughout the experiments, the aim of the patentee was to perfect the process of preserving green corn without losing any of the flavor of the milk and natural juices of the cereal in its green state, and to discover the method or means of fixing the constituents or elements of the corn when in the milk, so that, when packed in vessels to be preserved, the chemical relations of the constituents of the substance to each other would never change, unless the vessels containing the mixture were opened. Such a purpose, it is obvious, could not be accomplished by packing the corn in cans in the crude state, or before the kernels were removed from the cob, as the

juices of the kernels would be absorbed by the cob in the cooking; nor could he accomplish his object by cutting the kernels from the cob and boiling them in water before they were packed in the cans, or by cooking the kernels in open vessels without water; as in the one case the milk and other juices would be washed out of the kernels, and with that operation all the peculiar flavor of the cereal in the green state; and, in the other case, the aroma and juices of the kernels would be lost by evaporation.

His process includes the mode of preparing the mixture for filling the cans, as well as the mode of cooking and preserving the same; for, if it did not, the great aim he had in view would not be accomplished. Preserved green corn, unless it is packed and cooked in its own milk and juices, is of very little value, as it is only in that mode of operation that the preserved articles will retain the peculiar flavor and sweetness which the cereal possesses when fresh gathered from the field and cooked in the usual way.

No doubt the kernels may be removed from the cob without cutting, and may be preserved in that form under the process described in the foreign patent; but the decisive answer to that concession is, that that process is not the process of the complainants; and the product preserved in that mode of operation is of a very inferior quality, as appears by the concurrent testimony of all the witnesses. Sweet corn in the green state is a peculiar substance, differing in material respects from any other cereal or vegetable used for food. Its constituents are such, that it is singularly susceptible to fermentation, decomposition and change; more so than any other vegetable that has been successfully preserved in hermetically closed vessels for any considerable length of time. Such liability to rapid change is not due to any one particular constituent, but to the presence of several, such as gluten, sugar, fat and starch in such proportions as are calculated to promote fermentation and action upon each other. As compared with sweet peas, for instance, the kernels of sweet corn are much more delicate, and liable to change, as they contain a much larger proportion of milk, juice or sap, which itself contains more sugar, starch and oil than the juice of sweet peas, and the glutinous constituents which act as the ferment or primary cause of change are much more active in the juice of sweet corn than in that of sweet peas.

Equally instructive support to the same view is derived by comparing sweet corn with such fruits as peaches, as the juice of the peach contains no oil and more water than the corn, besides other differences of an equally important character; showing that such fruits as peaches are much less liable to ferment than sweet corn, and that they are much more easily preserved.

Examined in the light of these suggestions, as the case should be, it is clear that the mode of operation described in the complainants' specification differs widely from every process which preceded it, and that it effects a new and highly useful result. Wide differences in the mode of operation from anything which it is proved ever existed before is shown in every descriptive feature of the complainants' specification; and so palpable and marked are those differences, that it would create astonishment and surprise if any competent expert can be found who

would now venture to testify that the foreign process given in evidence is the same as that practiced by the complainants.

Great injustice, in my opinion, is done to the appellees in this case; but they may still enjoy the satisfaction to know, that, while courts of justice may alter the names of things, they cannot change the things themselves without exercising positive invention; nor can they obliterate the relation between cause and effect, for the reason that the law which regulates that relation is irrepealable.

THE FIRST UNITARIAN SOCIETY OF
CHICAGO, *Plff. in Err.*,

v.

H. FLOYD FAULKNER AND GEORGE R.
CLARK.

(See S. C., 1 Otto, 415-423.)

Admissions of agent, when evidence—error in instructions.

1. Admissions of an agent are not evidence without proof of the agency; but the former may be admitted before proof of the latter.
2. Instructions given by the court to the jury are entitled to a reasonable interpretation; and they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party.

[No. 57.]

Submitted Nov. 30, 1875. Decided Dec. 13, 1875.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action in *assumpsit*, brought in the court below by the defendants in error.

The case is fully stated in the opinion.

Messrs. Daniel L. Shorey and Jas. S. Norton, for plaintiff in error.

Messrs. R. M. Corwine, Quinton Corwine, J. A. L. Whittier, J. H. Thompson, H. C. Burchard and Walter Curtis, for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

Services were rendered by the plaintiffs, as architects, in making plans and designs, and in furnishing drawings, specifications and estimates for the Corporation defendants, preparatory to the erection and completion of a church edifice for their religious society. Annexed to the declaration is a bill of particulars, setting forth the claim of the plaintiffs, which is as follows:

For services as architects in making designs, plans, drawings, specifications and estimates for a church building, with basement, to cost seventy-eight thousand dollars...	\$2,730 00
For second design and drawings, showing the elevation of the church building, with chapel in rear, and tower between the church and chapel, to cost seventy thousand dollars.....	700 00
For modification of the above design, with chapel in rear, and tower at angle of the church, to	

See 1 Otto.

cost seventy thousand dollars....	700 00
For design of church with basement, but without tower, to cost forty thousand dollars.....	400 00
	<hr/> \$4,530 00

Due service was made, and the defendants appeared and pleaded that they never promised in manner and form as alleged in the declaration. Issue being joined, the parties went to trial; and the verdict was for the plaintiffs, in the sum of \$3,862.50, part of which was subsequently remitted, and judgment was rendered for the plaintiffs in the sum of \$2,900. Exceptions were duly filed by the defendants to the rulings and instructions of the court, and they sued out the present writ of error.

Enough appears in the transcript to show that the plaintiffs were partners, seeking employment as architects, and that the firm was represented, in all the negotiations reported in the bill of exceptions, by the junior member of the firm. Testimony was given by him at the trial, tending to prove that the plaintiffs, at the request of the defendants, had submitted plans to the latter for a church edifice, in competition with other architects, for the examination and choice of those composing the defendant corporation. Evidence was also offered by the plaintiffs, consisting of the testimony of the same witness, tending to prove conversations between him and the pastor of the church, and of the action of the plaintiffs in consequence thereof; and they also offered his testimony in evidence tending to show statements and admissions purporting to have been made by the pastor, in relation to the employment of the plaintiffs by the defendants as architects, at a social meeting of the church; to all of which the defendants objected, because no evidence had been given tending to show that the pastor was, in any sense, the agent of the defendants, or that he had any authority to act for them in relation to the employment of the plaintiffs as architects.

Responsive to that objection, the plaintiffs stated to the court that they expected to prove that the pastor acted in that behalf as the agent of the Society, and that the Society acquiesced in his acts; and upon that understanding the objection was overruled, the court remarking that the testimony would become material if the plaintiffs should subsequently give evidence to prove the agency of the pastor, at the time of the interview with the business partner of the plaintiffs when the plans were submitted or modified, and also at the social meeting of the Society, when certain members of the building committee and many members of the Society were present.

Exceptions were taken by the defendants to the ruling of the court in admitting these several declarations and admissions; but the bill of exceptions shows to the satisfaction of the court that the evidence was admitted, subject to the condition that the plaintiffs should subsequently prove that the party who made the declarations was the agent of the Society. No such evidence was afterwards introduced by the plaintiffs; but the bill of exceptions also shows that the attention of the court was not again called to the subject, and that the case was submitted to the jury on the hypothesis that it was not proved

that the plaintiffs were the architects of the Society.

Declarations of the pastor were not competent evidence, unless it was proved that he was the agent of the Society, and that the declarations or admissions were made in respect to matters within the scope of his agency. But it is not absolutely necessary that the proof of agency in every such case should be first introduced. Except in special cases, it is the better practice that the foundation, in such a case, should be laid before the declarations or admissions are admitted; but it is competent for the presiding judge, if in his judgment the ends of justice require it to relax the rules of practice, and to admit the evidence offered before the proper foundation for the admissibility of the same is laid, if he is well assured by the party offering the evidence that the agency in question will be subsequently proved.

Rules of practice, in conducting jury trials, are necessarily somewhat flexible; and that remark applies as well to the rules having relation to the order of proof as to those which regulate the number of witnesses which a party may examine, or the time, manner or extent of a cross-examination. All agree that, in ordinary cases, the plaintiff must begin, and the general rule is, that he must introduce all of his substantive evidence before the defendant is required to open his defense; and the corresponding general rule applicable to the defendant is, that he must introduce all of his substantive evidence before the plaintiff is required to give evidence in rebuttal.

Beyond all doubt, those are good general rules; but it is competent for the presiding judge, in case the ends of justice so require, to relax either of those rules of practice and to allow evidence to be given by either party in such other order as he, the said judge, in the exercise of a sound discretion, may direct. Where an agreement was offered in evidence, and it was necessary, in order that it should be competent for the consideration of a jury, that proof should be given that the signer was authorized to execute it, and the instrument having been admitted before the authority of the signer was proved, the opposite party excepted to the ruling of the court in admitting it; but *Judge Story* held that there was nothing in the exception, and remarked that "It was as competent for the party to prove the authority after, as it was before, giving the agreement in evidence." *Bank v. Gutschlick*, 14 Pet., 29.

Equally decisive are the views of this court as expressed in a subsequent case in the same volume. Speaking of the general subject, the court say, that the mode of conducting trials, the order of introducing evidence and the times when it is to be introduced, are properly matters belonging to the practice of the circuit courts, with which this court ought not to interfere, unless it shall choose to prescribe some fixed general rules upon the subject. *R. R. Co. v. Sampson*, 14 Pet., 468; *Wood v. U. S.*, 16 Pet., 361; *Kelly v. Crawford*, 5 Wall., 790 [72 U. S., XVIII., 563].

State courts have adopted the same rules of practice; and they are of such immediate necessity, that we should come to the same conclusion, even if the question was not controlled by the repeated decisions of this court. *Smith*

v. Britton, 4 Humph., 202; *Cushing v. Billings*, 2 Cush., 159; *Caton v. Carter*, 9 Gill & J., 477.

Whenever the strict rule is relaxed in such a case, it is the duty of the party to whom the indulgence has been extended to make good the assurances given to the court; and, in case of unreasonable delay, it would be quite proper for the court to call attention to the subject, and inform the delinquent party that the evidence admitted would be stricken out unless proof to lay the foundation for its admission was introduced before the evidence was closed. Nor must it be understood that the other party can remain silent, and suffer an error to be committed by the court, in order that he may have a valid exception if the verdict is in favor of his adversary.

Viewed in any light, it was not an error in the court to admit the evidence; and the attention of the court not having been again called to the subject, and inasmuch as the bill of exceptions shows that the evidence admitted, in view of the hypothesis adopted by the court in submitting the case to the jury, became entirely immaterial, the exception is overruled.

Evidence was exhibited tending to show that the defendants, at a legal meeting held on the 22d of January, 1872, appointed a building committee, consisting of five persons, preparatory to the erection of a new church edifice, and instructed the committee to obtain plans for such a building, and to submit the plans to the Society. Plans were accordingly solicited; and it appears that several were submitted to the committee at a subsequent meeting, and among others the plan prepared by the business partner of the plaintiffs. Preference, it seems, was given to the plan of the plaintiffs, as appears by the action of the committee. They voted to adopt the plan presented by the plaintiffs, subject to certain conditions: (1) That it be modified according to the wishes and suggestions of the committee. (2) That the contract for building the church shall not exceed \$58,000. (3) That the action of the committee be ratified at a legal meeting of the Society.

Alterations were made in the plan; and the Society subsequently instructed the committee to build the church according to the first plan of the plaintiff architect, provided the same could be built, all complete and satisfactory, at a cost not to exceed \$58,000, including such materials as the Society had on hand; and if it could not be built at that cost, to build according to the plan of another architect, which was submitted to the Society at that meeting.

Proof was also introduced by the defendants showing that bids or contracts for the building of the church according to the plaintiff's plan could not be procured for less than \$78,000; in consequence of which the Society refused to construct the church building according to that plan. Payment for the plans and modifications of the same furnished by the plaintiffs being refused, they instituted the present suit to recover compensation for the services rendered in that behalf by their business partner.

Extended comments upon the evidence given to the jury were made by the presiding justice; to a certain portion of which remarks the defendants excepted. Before adverting to those remarks, it is proper to state that the judge in-

structed the jury, that if what the business partner of the firm did, after the qualified acceptance of his plan, was done upon the same conditions under which the various competing plans were originally submitted, then the plaintiffs could not recover; nor could they recover upon the theory that it was understood between the parties that, in case the plan of the plaintiffs should be ultimately rejected, as in fact it was, they were to have a reasonable compensation for their services; by which is meant, as the court here understands the matter, that there was no sufficient evidence in the case to prove such an express agreement. He also instructed the jury that the defendants were only liable for the acts of agents duly authorized, or for acts of persons subsequently ratified by the Society; and he also gave the jury instructions as to the rule of damages in case they should find for the plaintiffs.

Plans had been submitted in the beginning by several architects; and the presiding justice, in the course of his remarks, adverted to that fact, and to the inquiry whether the plans were submitted with the understanding on both sides that there was to be no compensation unless the plans were accepted; and he added that, if such was the understanding, then every architect worked at his own risk and cost. All we know upon the subject, continued the judge, is what is stated by the plaintiff witness; from which it is perhaps fairly to be inferred that the plans originally presented were submitted upon that understanding by all the architects in competition at that time. But the difficulty in the case, said the judge, is, that the plan of the plaintiffs was subsequently accepted in a qualified sense. If the original plan submitted by the plaintiffs had been rejected at the time, there could have been no controversy. Except for that qualified acceptance, there would have been no trouble; but the difficulty now is to ascertain on what footing the parties stood in relation to the plans and modifications of the same presented by the business partner of the plaintiffs. He supposes he was the architect of the church; which, perhaps, is not strange, as the committee seem to have supposed that they had a right, on certain conditions, to make him such.

Throughout the remarks, the theory of the judge appears to have been that the plans were presented by the architects in the beginning at their own risk and cost; and the main purpose of this charge seems to have been to submit the question to the jury, in view of the whole evidence, whether the condition that they were to work at their own risk and cost, in case their plans were ultimately rejected, ceased to operate against the plaintiffs, in consequence of the acts of the committee and the action of the Society; or, in other words, whether or not it was the understanding, in view of all that took place subsequent to the qualified acceptance of the original plan presented by the business partner of the plaintiffs, that he was to go on at his own expense, and risk his own labor and that of those who were in his employment, if in point of fact the plans and the modifications of the same which he presented should finally be rejected by the Society.

These explanations prepare the way for an examination of that part of the charge of the
See 1 Otto.

court which is the subject of the only remaining exception to be considered in the case.

Mere verbal criticisms of the charge of the judge are not entitled to any considerable weight in a court of errors. Such courts look at the substance and legal effect of the language employed, without much regard to mere inaccuracy of expression, unless the error is one which might prejudice the rights of the party seeking redress.

Indirect allusion is made by the judge to the second condition in the vote of the committee adopting the plan of the plaintiffs, that the cost of the church when completed should not "exceed \$58,000;" and he remarked that there must be a reasonable construction given to that language. Contracts, said the judge, it is manifest, might have been let to parties apparently responsible at the time, for that price, and yet the actual cost might have turned out to be much greater. There are certain elements, continued the judge, always entering into matters of the kind, making it necessary that the language should be reasonably construed, in reference to the subject-matter and the circumstances; and, when so construed, his opinion was, and he so stated to the jury, that it could not be supposed that the meaning of the resolution was, that the church should not cost, to a dollar, beyond that amount; that the sum specified was intended as a reasonable limit, applying to the language the ordinary rules which reasonable men would apply to such a transaction.

In the course of the charge, he also adverted to the fact that one of the building committee had given the language of the condition a closer construction, and continued his remarks by saying that he understood the condition to mean, that though it was in the nature of a limit to the architect and to the committee, yet that the language must receive a reasonable construction; and that it should be regarded, not as an absolute limit, but one as nearly exact and absolute as the subject-matter and the nature and circumstances of the case would admit.

Even if taken literally, it would be very difficult to point out any legal error in those remarks; but the remarks are somewhat qualified by what follows in the succeeding sentence, in which the judge proceeds to say to the effect, that the view previously presented to the jury is in no respect material, except so far as it may bear on the question, whether the business partner of the plaintiffs was all the time performing service at his own expense, and with the understanding, that, if his plans were ultimately rejected, he was to receive no compensation. Those remarks, it is obvious, had respect to the theory of the defendants, that the plaintiffs' plans had never in any way, or to any extent, been adopted either by the Society or the committee.

Quite a different theory was maintained by the plaintiffs; and in respect to that the judge remarked that, if the plans had been accepted and the contract made at the price specified in the second condition of the vote of the committee, it would scarcely be contended, if it turned out that the Society had to expend a sum greater than the prescribed limit, that the plaintiffs would not be entitled to anything for services performed as architects. Suppose, said the judge, the contractor should become bankrupt,

or fail; was the architect to have nothing for his services, even if the church did cost more than the contract price?

Two or three passages of the charge, it must be admitted, are quite indefinite, and somewhat obscure; but they are not more so than the exceptions of the defendants, which are addressed to nearly a page of the remarks of the judge, without any attempt to specify any particular paragraph or passage as the subject of complaint; nor does the assignment of errors have much tendency to remove the ambiguity.

Instructions given by the court to the jury are entitled to a reasonable interpretation; and they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party. *Castle v. Bullard*, 23 How., 189 [64 U. S., XVI., 429].

Even now, though the complaining party has filed an assignment of errors and submitted a written argument, it is by no means certain what the precise complaint is, unless it be that the verdict, in their view, is for the wrong party. Courts of error have nothing to do with the verdict of the jury, if it is general and in due form, except to ascertain, if they can, whether improper evidence was admitted to the jury, or whether the jury were misdirected by the presiding judge. No error of the kind is shown in the record; and the judgment is affirmed.

IRA P. NUDD AND S. R. NOE, *Plffs. in Err.*,
v.

GEORGE B. BURROWS, Assignee of the Estate of NORTON EMMONS, a Bankrupt.

(See S. C., 1 Otto, 426-442.)

*Declarations of co-conspirator, when evidence—
—factor's lien under Bankrupt Act—practice.*

1. The declarations of a co-conspirator are evidence against his associates, whether made in their presence or not.

2. The declaration of a party cannot be received in his favor.

3. A factor's lien occupies no better ground as a preference, under the Bankrupt Act, than would a mortgage, pledge or power to confess judgment, given at the same time and for the same purpose.

4. Under the Act of Congress of June 1, 1872, the personal conduct and administration of the judge in the discharge of his separate functions on the trial of a cause is neither practice, pleading, nor a form nor mode of proceeding, within the meaning of those terms as used in that Act.

[No. 58.]

Submitted Nov. 30, 1875. Decided Dec. 13, 1875.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action brought in the court below by the defendant in error, as the assignee of one Norton Emmons, a bankrupt, against the plaintiffs in error, to recover the net proceeds of about eleven car-loads of live-stock and dressed hogs, shipped by the bankrupt to the plaintiffs in error, and \$1,000 paid by the said bankrupt to the said plaintiffs in error, and which proceeds and money paid had been applied by the plaintiffs in error to the payment

of an indebtedness from the bankrupt to them, in fraud, as contended by the defendant in error, of the provisions of the Bankrupt Act. Judgment was rendered in favor of said defendant in error, as such assignee, against said plaintiffs in error, June 13, 1873, for the sum of \$9,729.47 damages and costs, to reverse which the case is brought to this court for review.

The nature of the exceptions of the plaintiffs in error to the evidence and to a portion of the charge, fully appears in the opinion.

The charge of the court as to the facts, to which exception was taken, is as follows:

Defendants' counsel prepared in writing the following instruction, and requested the court to give the same to the jury, and to deliver it to them to take with them to their room:

"If the jury believe from the evidence that either R. B. or J. W. Chandler was a partner of Norton Emmons, subsequent to Dec. 13, 1870, and remained so until the settlement of account with defendants and, as such partner or partners, was or were interested in the dealings with the defendants, subsequent to that date, they are instructed that in such case the plaintiff cannot maintain this suit."

The court read the instruction to the jury, but commented upon it, as follows:

"I have charged you, as requested by defendants' counsel, that if this debt on the part of the defendants was against Emmons and the Chandlers, or either of them, the plaintiff cannot recover. * * * On the main question, which covers most of the property, I shall not occupy much time. The evidence to establish it rests in writing, under the defendants' own signature. By the defendants' books it appears that the partnership account of Emmons & Co. was settled and balance transferred upon their books to the individual account of Norton Emmons, Dec. 13; that after that it was kept with him alone, and the defendants did not pay any amount to the Chandlers, without an order from Emmons, and in addition to this they signed a receipt, release or declaration as follows:

'CHICAGO, Dec. 13, 1870.

To whom it may concern.

This certifies that, whereas, Mr. R. B. Chandler has been a joint partner with Norton Emmons, from the first day of July, 1870, to date, we release him from any further obligation that may be transacted between us and Norton Emmons, and look to Norton Emmons only for balance of present account, and all business that may hereafter be transacted with him. The above release of R. B. Chandler is made by the consent of all parties.'

That would seem to settle all controversy upon this question. That matter having been so carefully reduced to writing by the defendants, at the time or soon after, while the matter was fresh in their memory, it would seem most remarkable to allow them now to swear it away. The book and the release show that they agreed to deal thereafter with Emmons, and released Chandler altogether, and did so on their books. So far as Chandler and Emmons are concerned, it was an individual matter with them; but as the assignee represents Emmons' right, and is entitled to the benefits under his contract, it would be very remarkable that

NOTE.—Effect of admissions of partner after dissolution, on his copartners. See note to *Thompson v. Bowman*, 73 U. S., XVIII., 736.

they could, in view of these entries and the statement or release, be allowed to set up that he was still a partner in interest as to that. Written testimony is much stronger than parol; it is like a disputed case in regard to the boundaries of real estate in which a government boundary is discovered; it generally disposes of the dispute, and outweighs, ordinarily, any amount of verbal testimony, depending on the recollection of witnesses, particularly interested parties and witnesses. Nudd says he drew the release, but says he did not draw it until in January, after that date. The time when it was drawn is quite immaterial. It declares the fact that they did business with Emmons alone, and if that is so, that disposes of the defense on that ground.

There is some testimony that the receipt was given to Chandler on the 13th. Emmons says that he heard him say he had a receipt when he returned home. If you are satisfied that the receipt was made at the time it bears date, or afterwards, with a view to furnishing evidence to release Chandler from the 13th, and as stating the true condition of their affairs, I think you will be justified in finding that the transaction of the parties was not as stated in the books of the defendants, and in this release or declaration, and it would be unsafe to reject written evidence of that character, upon evidence of interested parties."

Defendants' counsel also prepared the following written instruction, and requested the court to give the same to the jury, and to deliver it to them, to take with them to their room:

"If the jury believe from the evidence that the defendants advanced money to Norton Emmons, to buy stock to be consigned to them, relying upon those consignments for the repayment of those advances, they are instructed that, in such case, the defendants would have a lien upon such consignments for such advances, as soon as the same came to their possession, even if the defendants knew at the time of making such advances, that Emmons was insolvent."

The court gave this instruction but modified the same, and commented thereon as follows:

"The books of account of defendants, read in evidence together with the testimony, tend to show that the defendants had been advancing the bankrupt money, from time to time after Dec. 13, and that, Dec. 31, 1870, the time of the last item of account, the bankrupt was owing to them the sum of \$8,558.87. This money, it is claimed, was advanced by defendants, who were stock-brokers and general commission men in this city, engaged in the business of receiving stock, cattle and hogs, making advances thereon, and selling for the benefit of shippers. They state that their ordinary mode of doing business was not to pay drafts drawn by their country customers or consignors, until after the receipt of stock; but in this case, they permitted the bankrupt to draw and obtain the money to use in buying stock. When that stock was received and sold, they credited his account with the proceeds, and such appears to have been the way they dealt with the bankrupt, so that he had overdrawn his shipments Jan. 1, in the sum of \$8,558.87, above stated. This being the mode of business pursued, as I understand it to be stated, I think it would constitute the relation of debtor and creditor be-

See 1 Otto.

tween the bankrupt and the defendants; that he, in law and fact, was owing, Jan. 1, to the amount above stated, which was unsecured at that time; that the advances did not create a lien on such stock, purchased with the money advanced or loaned for that purpose, until the bankrupt had actually shipped them to the defendants. As I have charged you, at the request of the defendants' counsel, that the lien of the defendants did not attach until the actual receipt of the stock by the defendants, such being the law, the subsequent receipt of stock and appropriation of the avails to the payment of the debts due them, would be void as a preferential payment, provided the other facts hereinafter mentioned are found to have existed, by which I mean to be understood that if the transactions between the parties were as I have before stated them, they would constitute the relation of debtor and creditor, and bring their debt under the provisions of the Bankrupt Act, the same as any other debt."

Messrs. W. C. Grant, J. H. Thompson and W. H. Swift, for plaintiffs in error:

The plaintiff claimed that the copartnership was dissolved by agreement; that is to say, by acts and declarations of the two Chandlers; and the defendants had a right to show subsequent contradictory acts and declarations by them; for the purpose of impeaching this testimony on behalf of the plaintiff, if for no other purpose.

The plaintiff claimed that the two Chandlers and Emmons made a certain agreement concerning the manner in which their liability to the defendants was to be paid, and that the time of its execution extended from Dec. 13, 1870, to Jan. 10, 1871. Then anything done or said by either of the parties during this time, in connection with this agreement and its execution, was admissible as a part of the *res gestæ*.

Phil. Ev., 185; *Poole v. Bridges*, 4 Pick., 378; *Richardson v. Cato*, 10 Humph., 188; *Nelson v. Iverson*, 24 Ala., 9; *Barnes v. Mobley*, 21 Ala., 232; *Stansbury v. Arkwright*, 5 Car. & P., 575; *Allen v. Duncan*, 11 Pick., 310; *Boyden v. Moore*, 11 Pick., 362; *Nicholls v. Downing*, 1 Stark, 81.

Whatever James W. Chandler said about the price to be obtained for the consignments of stock with which he came, was admissible.

Willies v. Farley, 3 Car. & P., 395; *Adams v. Davidson*, 10 N. Y., 809; *Stewart v. Hanson*, 35 Me., 506.

The fact that the Chandlers were not parties to the suit was not sufficient to sustain the rulings of the court, inasmuch as the suit involved matters concerning which they certainly, at one time, had a mutual interest with Emmons.

Greenl. Ev., sec. 181; Phil. Ev., 498; *Clay v. Langslow*, 1 Mood. & M., 45; *Howard v. Cobb*, 3 Day, 309; *Adams v. Brownson*, 1 Tyler, 452; *Fisk v. Copeland*, 1 Tenn. (Over.), 383.

Defendants' counsel, in apt time, requested the court in charging the jury to follow the practice of courts of record of the State of Illinois, and the laws of the State of Illinois, applying to such matters. The court refused to follow such practice and such law.

R. S., U. S., sec. 914; 2 Gross, Stats. Ill., ch. 83, secs. 139-143; *Bloomer v. Sherrill*, 11 Ill., 483; *Ray v. Wooters*, 19 Ill., 82; *Eames v. Blackhart*, 12 Ill., 195; *Sherman v. Dutch*, 16 Ill.,

288; *Wall v. Goodenough*, 16 Ill., 415; *Seaverns v. Tribby*, 48 Ill., 195; *Hovey v. Thompson*, 87 Ill., 538.

The court erred in the instruction given upon the question of copartnership. The plaintiff introduced a document, dated Dec. 13, 1870, and signed by the defendants, purporting to release R. B. Chandler, which document is given in full in the charge. The defendants testify that this document was not given until about the middle of Jan., 1871, after their account was closed; that it was antedated at the request of R. B. Chandler, and was given unhesitatingly and with but little inquiry into Chandler's reasons for wishing the same antedated, because, at the time at which it was actually given, their account had been paid in full.

The court, in effect, charged the jury that this document would operate as an estoppel upon the defendants, and that they were prevented from denying that it was given at the time of its date, Dec. 13, 1870.

Whenever this receipt or release was given, it could not operate as an estoppel upon the defendants, for neither Norton Emmons nor any creditor whom the assignee represented could by it have been led into any different position from that which he would otherwise have occupied. Nor does it appear that either of the creditors of Norton Emmons ever saw this receipt or release, nor that the action of either of such creditors, nor of Norton Emmons himself, was in any manner influenced thereby. The charge of the court upon this point is virtually a direction to the jury that, so far as this case was concerned, they must find that Emmons and the Chandlers dissolved Dec. 13. This would not follow, even if the receipt or release were so strong as to operate as an estoppel, for it only applies to R. B. Chandler; and if J. W. Chandler remained in the firm up to the time of the closing of defendant's account, the action would not be maintained. This question of the continuance of the copartnership was a material one. If a preference is given by a firm of which only one member subsequently goes into bankruptcy, such preference cannot be avoided by the assignee of the bankrupt partner.

Forsaith v. Merritt, 3 Nat. Bk. Reg., 48; *In re Shepard*, 3 Nat. Bk. Reg., 172; *Withrow v. Fowler*, 7 Nat. Bk. Reg., 389.

The court erred in its instruction upon the question of a factor's lien. The advances made by the defendants were not made upon the personal credit of Emmons, nor of the firm of Emmons & Chandler. They were made in reliance upon consignments that were to be made immediately after, and to cover such advances. This had been the uniform course of business between the defendants and Emmons, and the firm of Emmons & Chandler.

Fisher v. Miller, 1 Bing., 150; *Anderson v. Clarke*, 2 Bing., 20; *Haille v. Smith*, 1 B. & P., 564; 3 Pars. Cont., 260; *Foxcroft v. Devonshire*, 2 Burr., 931; *Hunt, Conv.*, 157; *Mayor v. Croome*, 1 Bing., 261; *Marshall v. Lamb*, 5 Q. B., *Patterson, J.*, p. 125; *Thompson v. Beaton*, 1 Bing., 145.

Messrs. H. W. Tenney, H. M. Lewis and J. C. McKenney, for defendant in error:

When a conspiracy is formed to do an illegal act, or to commit a fraud, the acts or declara-

tions of any of the conspirators may be given in evidence, although not done or spoken in the presence of others nor even brought to their knowledge.

1 Greenl. Ev., sec. 111; 8 Greenl. Ev., sec. 94; *Am. Fur Co. v. U. S.*, 2 Pet., 358; *U. S. v. Cole*, 5 McLean, 513; *Page v. Parker*, 43 N. H., 368; Act, Mar. 2, 1867, sec. 14; *Bump, Bankr.*, 6th ed., 382, and cases cited.

The objection to the question calling for the declarations or statements of Richard B. Chandler, was correctly sustained for obvious reasons:

1. He was himself a competent witness and could have been called as a witness for the plaintiffs in error.

2. It was hearsay testimony, and no reason was given or offered for not calling Mr. Chandler himself, or for resorting to secondary evidence. 1 Greenl. Ev., sec. 124.

The same reason applies to sustaining the objection to the question calling for declarations from James W. Chandler.

The court did not instruct the jury as to the facts, but confined its instructions to the legal propositions involved.

Goddard v. Foster, 17 Wall., 123 (84 U. S., XXI., 589); *Stitt v. Huidkopers*, 17 Wall., 384 (84 U. S., XXI., 644); *Johnson v. McLean*, Hempst., 59; *Carver v. Jackson*, 4 Pet., 1; *Evans v. Euton*, 7 Wheat., 356; *Garrard v. Reynolds*, 4 How., 123; *Games v. Stiles*, 14 Pet., 322.

The indebtedness of the bankrupt, Emmons, to the plaintiffs in error Jan. 1, 1871, stood upon the same footing as that of any other unsecured creditor.

Arnold v. Maynard, 2 Story, 349; *Kinloch v. Craig*, 3 T. R., 119-788; *Wager v. Hall*, 16 Wall., 584 (83 U. S., XXI., 504); 2 Kent, Com., 686; *Rushforth v. Hadfield*, 6 East, 519; *S. C.*, 7 East, 224; *Bleaden v. Hancock*, 4 Car. & P., 152; 8 Pars. Cont., 239; *Ryberg v. Snell*, 2 Wash. C. C., 404; *Bholen v. Cleveland*, 5 Mas., 174; *Story, Ag.*, sec. 377; *Copland v. Stein*, 8 T. R., 199; *Nichols v. Clent*, 3 Price, 547.

Mr. Justice Swayne delivered the opinion of the court:

The first of the assignments of error presents the question, whether the court erred in admitting in evidence the declarations of the bankrupt.

The suit was brought by the assignee to recover against Nudd and Noe for money and property which they had received from Emmons. They had applied the money and the proceeds of the property in payment of a debt which Emmons owed them. The property was live stock, consisting of cattle, sheep and hogs. The net proceeds were \$7,553.27. The money was \$1,000. The aggregate amount in controversy was \$8,553.27. The assignee claimed that the stock was bought largely upon credit; that Emmons was at the time hopelessly insolvent; that Nudd and Noe knew it; and that the transaction was the fruit of a conspiracy between the parties, having for its object the giving to Nudd and Noe by Emmons a fraudulent preference over his other creditors.

Nudd and Noe received the property and money in January, 1871. The petition in bankruptcy against Emmons was filed in the following month of February. The action was

founded on the 35th and 39th sections of the Bankrupt Act, 14 Stat. at L., 517. The transaction was within four months before the filing of the petition. Upon the trial, the plaintiff proposed to prove what Emmons had said touching the purchase of the stock and the payment of the money to the defendants.

To each and all of the questions asked with this view the counsel for the defendants objected, "On the ground that they called for the declarations of Emmons not made in the presence of either of the defendants or brought to their knowledge."

Was this ground of objection well taken?

The counsel for the defendant in error insists that they were competent as the declarations of a co-conspirator.

In general, the rules of evidence are the same in civil and criminal cases. *U. S. v. Gooding*, 12 Wheat., 469.

"Where two or more persons are associated for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gesta*, may be given in evidence." *Fur Co. v. U. S.*, 2 Pet., 365.

The bill of exceptions does not purport to give all the evidence. What proof had been given of the alleged concert and conspiracy on the part of the defendants, when the declarations of Emmons were offered to be proved, does not appear.

It is to be presumed it was sufficient to lay the proper foundation as to them for the introduction of the evidence. The declarations were competent to prove the whole case as against Emmons. 1 Taylor, Ev., 486.

Whether the declarations were made in the presence or brought to the knowledge of either of the defendants is immaterial. The objection as taken was confined to this point; and this is the only aspect in which it is necessary to consider it. If it were intended to rest it upon any other ground, it should have been so presented; and the court advised accordingly.

In the early part of December, 1870, Emmons and James W. and Richard Chandler were partners, under the name of Emmons & Chandler. The plaintiff claimed that the partnership was dissolved on the 18th of that month. The defendants insisted that it continued down to the close of the business in question, and that the transaction was not with Emmons alone, but with the firm of Emmons & Chandler.

They offered in evidence the declarations of the Chandlers touching the points in controversy. The court excluded the testimony, and the defendants excepted.

This ruling was correct. The declarations of a party may be evidence against him; but, except under circumstances which had no existence in this case, they cannot be received in his favor. The Chandlers might have been called as witnesses. Their declarations were merely hearsay and, as regards this case, were *res inter alios acta*.

It appears by the bill of exceptions, that, in charging the jury, the judge commented upon the evidence.

Questions of law are to be determined by the court; questions of fact, by the jury. The authority of the jury as to the latter is as absolute as the authority of the court with respect to the former.

lute as the authority of the court with respect to the former.

No question of fact must be withdrawn from the determination of those whose function it is to decide such issues.

The line which separates the two provinces must not be overlooked by the court. Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory, and in nowise intended to fetter the exercise finally of their own independent judgment. Within these limitations, it is the right and duty of the court to aid them, by recalling the testimony to their recollection; by collating its details; by suggesting grounds of preference where there is contradiction; by directing their attention to the most important facts; by eliminating the true points of inquiry; by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting upon those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake or caprice may determine the result.

We do not think the remarks and suggestions of the learned judge in this case exceeded the proper license.

They did not go beyond the verge of what has been often sanctioned by this and other courts. *Games v. Stiles*, 14 Pet., 387; *U. S. v. Fourteen Packages*, Gilp., 254; 1 Taylor, Ev., 35.

The modifications of the two instructions asked for by the defendants were, we think, correct in point of law. Only the second one calls for any remarks.

There was proof tending to show that on the 18th of December, 1870, the defendants adjusted their account with Emmons & Chandler and, by the agreement of all the parties, transferred the amount due to themselves to the separate account of Emmons, and gave the Chandlers a release. The balance found due and so transferred was the same with the amount in controversy, as before stated. The business of the defendants was the selling of live-stock upon commission. The balance accrued in the course of their previous business in this way with the firm of Emmons & Chandler. They claimed a factor's lien upon the money and proceeds of the property in question for the satisfaction of this demand.

The court charged, that, as the lien could not attach until the money and proceeds were received by the defendants, if the previous transactions created the relation of debtor and creditors between them and Emmons, and they could have sued Emmons for the amount, "this would bring the debt under the bankrupt Act the same as any other debt."

This must necessarily be so. The lien attempted to be set up was repelled by the circumstances referred to. Such a claim occupies

no better ground than would a mortgage, pledge or power to confess judgment, given at the same time and for the same purpose; otherwise every factor might be thus secured when his debtor was in the article of bankruptcy, and this class of creditors would have a monopoly of the preferences so given. Such preference, to whomsoever given, is forbidden by the Bankrupt Law, and is a fraud upon it. Fraud destroys the validity of everything into which it enters. It affects fatally even the most solemn judgments and decrees. Bankrupt Act, sec. 85; 1 Story, Eq., sec. 252; Freem. Judg., sec. 486.

Whenever fraud is perpetrated by one party to the injury of another, the offender is liable. *Pasley v. Freeman*, 3 T. R., 51; *Benton v. Pratt*, 2 Wend., 885. Here the jury have found the facts charged by the assignee. This is conclusive against the defendants with respect to any claim upon the fund.

The last assignment relates to alleged errors of the court in matters of practice. Before the judge began his charge to the jury, the counsel for the defendants requested him, in giving it, to conform in all things to the practice of the courts of record and the law of the State. This he refused to do. He also refused to allow the jury to take with them to their room the written instructions he had given them and likewise the account-book, bills of lading and additional papers, which had been introduced in evidence, other than the depositions. To each of these refusals the defendants excepted.

The Practice Act of Illinois provides that the court, in charging the jury, shall instruct them only as to the law of the case: that no instructions shall be given, unless reduced to writing; that instructions asked shall not be modified by the court, except in writing; that the instructions shall be taken by the jury in their retirement, and returned with the verdict; and that papers read in evidence, other than depositions, may be carried from the bar by the jury. 1 Gross, Stat., 289.

It is declared by the Act of Congress of June 1, 1872, 17 Stat. at L., 197, sec. 5, "That the practice, pleadings and forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be" to the same things "existing at the time in the courts of record of the State within which such circuit and district courts are held."

The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the federal and state courts of the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common law pleadings, forms and practice were adhered to, in the state courts of the same district the simpler forms of the local Code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States

which it prescribes. The remedy was complete. The personal administration by the judge of his duties while sitting upon the Bench was not complained of. No one objected or sought a remedy in that direction.

We see nothing in the Act to warrant the conclusion that it was intended to have such an application.

If the proposition of the counsel for the plaintiff in error be correct, the powers of the judge, as defined by the common law, were largely trenched upon.

A statute claimed to work this effect must be strictly construed. But no severity of construction is necessary to harmonize the language employed with the view we have expressed. The identity required is to be in "the practice, pleadings and forms and modes of proceeding." The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading nor a form nor mode of proceeding within the meaning of those terms as found in the context. The subject of these exceptions is, therefore, not within the Act as we understand it.

There are certain powers inherent in the judicial office. How far the Legislative Department of the Government can impair them, or dictate the manner of their exercise, are interesting questions, but it is unnecessary in this case to consider them. *Houston v. Williams*, 18 Cal., 24.

The judgment of the Circuit Court is affirmed.

Cited—93 U. S., 299; 95 U. S., 166; 97 U. S., 584, 696; 15 Blatchf., 405; 81 N. Y., 19.

STATE OF FLORIDA, Complainant,

v.

EDWARD C. ANDERSON, JR., DANIEL P. HOLLAND ET AL., Defendants.

(See S. C., 1 Otto, 667-683.)

State owning railroad securities, when may sue—rights of creditor—trustees—when must foreclose—vendor's lien—effect of foreclosure—consent decree.

1. A State which has a direct interest in a railroad, by reason of holding \$4,000,000 of bonds which are a statutory lien upon the road, and where the trustees of the bonds are merely agents of the State invested with the legal title of the lands, may seek equitable relief against citizens of another State by filing an original bill in this court to subject the road to the payment of such bonds.

2. A judgment creditor, who had full knowledge of the circumstances before obtaining his judgment, and who purchased only the right, title and interest of the company, cannot hold the property clear of the lien of the State.

3. Where a bond holder has a statutory lien on the railroad, he cannot avail himself of it directly, as he could if it were a mortgage given to secure the bonds alone, but he must induce the trustees to act in the mode pointed out by the statute.

4. If they refuse to act when they ought, the bond holder may either compel them to do so by *mandamus*, or file a bill in equity to obtain the relief to which he may be entitled.

5. But if principal or interest become due and be unpaid, and the trustees have not the means to pay it, it will be their absolute duty to proceed against the property.

6. Where the trustees did initiate proceedings, and did sell the property by virtue of the lien created by the statute, but the purchasers failed to pay the entire purchase money, and a vendor's lien attached, the original lien of the bonds was consummated and merged in the title which the purchasers acquired by the sale.

7. The getting of a consent decree by the bond holders for the sale of the road to pay their bonds, in a proceeding in which neither the State nor the trustees were represented, when the latter were pursuing their lawful remedy to subject the road to the payment of the purchase money, was an inequitable interference with and a fraud upon their rights.

[No. 8. Orig.]

Argued Oct. 28, 29, 1875. Decided Dec. 13, 1875.

IN CHANCERY.

The case as it was presented upon the final hearing, being substantially the same as arose upon the original bill of complaint and the answers of the original defendants, is fully stated in the opinion.

The following is a summary of the principal proceedings had in this case prior to the final hearing.

Dec. 9, 1873, on motion of *Mr. M. H. Carpenter*, leave was granted to file the bill and motion for injunction in this cause, the motion for the injunction to be heard on some future day on notice. Upon the same day the bill was filed, *Mr. H. Bisbee, Jr.*, being the solicitor for the State of Florida, with whom was associated *Mr. M. H. Carpenter*.

Dec. 19, a demurrer by the defendants, *E. C. Anderson, Jr., et al.*, was filed. Dec. 19, 22 and 23, the motion for a temporary injunction and for a receiver was argued by *Mr. H. Bisbee, Jr.*, in support of the same, and by *Mr. H. R. Jackson* in opposition; also by *Mr. W. W. Boyce* in behalf of defendant, *Holland*, in opposition. Dec. 19, also, *Mr. Jackson* argued in support of a motion to dismiss the bill, and *Mr. Bisbee* in opposition.

Dec. 24 a preliminary injunction was granted. Jan. 26, 1874, a petition was filed by *D. M. Boissevain et al.*, to be made parties. Jan. 30, the above-mentioned demurrer was argued by *Mr. H. R. Jackson*, for the defendants in support of the same, and by *Mr. H. Bisbee, Jr.*, in opposition; *Mr. W. W. McFarland*, in behalf of his clients on their petition to be made parties, took part in the argument.

Feb. 28, *Holland* filed an answer. Mar. 9, the demurrer of *Anderson et al.* was overruled. Mar. 16, the petition of *D. M. Boissevain et al.* to be made parties defendants was granted. Mar. 27 *Anderson et al.* filed their answer. Apr. 7, a motion of complainants to dismiss the case as to *Holland* was filed. Apr. 14, a motion for leave to *R. H. Johnson et al.* to appear was filed. Apr. 16 a motion for leave to file a petition for a receiver was granted, and such petition was filed by the defendants. Apr. 22, the answer and cross bill of *D. M. Boissevain et al.* were filed. These defendants alleged that they were the *bona fide* purchasers and holders of over \$3,000,000 of the \$4,000,000 of the bonds of the State which were issued to the Jacksonville, Pensacola & Mobile Railway Co.; that there was at the same time delivered to the State, as security therefor and for the benefit of the purchasers of the said state bonds, \$3,000,000 in the bonds of the J. P. & M. R. R. Co., and \$1,000,000 in the bonds of the Florida Central R. R. Co. They prayed that the State

might be adjudged to be a trustee for them in respect of the aforesaid railroad bonds and the lien thereof, and that the property of every kind subject to the lien of the said railroad bonds might be decreed to be sold for the benefit of them and others in like situation, subject to any just prior liens, etc. Apr. 28, the consent of *Holland* that the suit as to him be dismissed at complainant's cost was filed. On the same day a petition of *R. H. Johnson et al.* to be made parties was filed. On the same day also, a petition of the Atty-Gen. of Florida that the bill be dismissed or amended was filed. Upon this day also, the motion for the appointment of a receiver was argued by *Messrs. H. R. Jackson* and *W. W. McFarland* in support thereof, and submitted on printed briefs by *Mr. H. Bisbee, Jr.*, in opposition. Apr. 24, leave was granted to *R. H. Johnson et al.* to be made parties defendant. Upon the same day *Mr. Robert Walker* was appointed receiver. June 9, the answer of *Anderson et al.* to the cross-bill of *Boissevain et al.* was filed. June 22, 1874, a separate answer by *R. H. Johnson* was filed. June 24, a cross-bill by *R. H. Johnson* was filed. On the same day a cross-bill was filed by *R. H. Johnson et al.* June 30, the answer of *R. H. Johnson et al.* was filed. The cross-bill of *R. H. Johnson* set out that he was the owner of certain bonds of the Pensacola & Georgia R. R. Co. and that said bonds were secured by a second mortgage; that the orator had a right to redeem said railroad from a lien of the first mortgage bond incumbrance, if such should be decreed to exist by this court, and asked that the orator should be decreed, on making such payment, to have the right to lease or sell said railroad and apply the proceeds of said sale or lease to the re-imbursement of the amount paid out to discharge said first lien. The cross-bill of *R. H. Johnson et al.* set up that they were the owners of certain bonds of the Florida, Atlantic and Gulf Central R. R. Companies, commonly known as the "second mortgage or free land" bonds. June 30, an amendment to the original bill and a demurrer to the cross-bill of *Boissevain* were filed by the complainant. Aug. 11, *Anderson et al.* answered the amended bill and the cross bill of *R. H. Johnson et al.* *R. H. Johnson et al.* also answered the amended bill. Aug. 28, a petition of the Rogers Locomotive and Machine Works was filed. This petition set out that the petitioner had delivered to the Tallahassee R. R. Co. five engines and tenders under an agreement that if the R. R. Co. should pay, when they became due, certain promissory notes, the engines and tenders were to become the property of the R. R. Co.; in the meantime the petitioner to retain the title. The petition further alleged that only one of said notes had been paid; that the engines were in the possession of *Walker*, receiver of the court; and asked that he be directed to sell at public auction the said engines and tenders for the satisfaction of the debt due to the petitioner. Sep. 30, leave being granted, *Boissevain et al.* filed an answer to the complainant's bill and amended bill and to the cross-bill of *R. H. Johnson et al.* On the same day the amended cross-bill of *Boissevain et al.* was filed. Oct. 1, the answer of the receiver to the petition of the Rogers Locomotive Works was filed. This answer set up that the use of the engines was

necessary to the receiver in the discharge of his trust; that over \$50,000 had already been paid on account thereof, only about \$15,000 being still due, and suggested that the receiver pay this, as fast as he could do so, from the earnings of the road. Oct. 6, leave being granted, Anderson *et al.* filed a demurrer to the amended cross-bill of Boissevain *et al.* Oct. 16, complainant filed a demurrer to the cross-bill of R. H. Johnson *et al.* Oct. 16, the following motion was filed:

It is respectfully represented on behalf of the defendants, E. C. Anderson, Jr., *et al.*, as follows:

1. That the State of Florida, by amendment of its original bill, and Boissevain *et al.*, by original and amended cross-bill, and R. H. Johnson *et al.*, by cross-bill, have sought to introduce parties into said cause who are not within the jurisdiction of the court, namely: the Florida Central Railroad Company, the Jacksonville, Pensacola and Mobile Railroad Company, Milton S. Littlefield, Rhoda E. Gibbs *et al.*, corporators and citizens of the State of Florida.

2. That the said Boissevain *et al.*, and the said R. H. Johnson *et al.*, have sought by their said cross-bill to introduce new parties not embraced in the original bill, to wit: the parties above named and others:

3. That the said Boissevain *et al.*, by their said cross-bill, are seeking to introduce new matters and new controversies into the said cause, and to procure a decree which cannot be predicated upon the case as made by the original bill, and which it is not within the jurisdiction of this court to render, to wit: controversies between the said Boissevain *et al.* and the State of Florida, and the Jacksonville, Pensacola and Mobile Railroad Company and the Florida Central Railroad Company *et al.* as to the validity of the bonds of the said State issued under the provisions of the Acts of 1869 and 1870, and as to the liability (of the several lines of railway from Jacksonville to Lake City; from Lake City to Quincy; from Tallahassee to St. Marks, and from Quincy westward) to seizure for non-payment of interest upon the bonds of the said Railroad Companies, given in exchange therefor, and a decree declaring the said State to be a trustee holding the said last named bonds for the benefit of the said Boissevain *et al.*, and that the entire line of railway above described may be sold for payment of the same.

4. That the said R. H. Johnson *et al.* by their cross-bill sought to introduce new matter and new controversies, to wit: controversies between themselves, claiming to be the holders of second mortgage bonds of the Florida, Atlantic and Gulf Central Railroad Company on the one side, and the Florida Central Railroad Company holding the property of the first above-named Company under sale made by the trustees of the internal improvement fund of the State of Florida; the said Florida Central Railroad Company not being a party to the bill filed by the State, not being within the jurisdiction of this court, and its said property not being covered by the decrees of the Circuit Court of the United States, which the said original bill of the said State was filed to enjoin.

5. That to the first cross-bill of Boissevain *et al.*, the said E. C. Anderson *et al.* filed their an-

swer on the 22d day of June last, and to the amended bill of the State, and the said cross-bill of the said R. H. Johnson *et al.*, on the 11th day of August last; but distinctly denying the rights of the said R. H. Johnson and others to make them parties defendants to said cross-bill or so to intervene in this cause for the purpose of seeking any relief whatsoever, and specially reserving all rights of objection thereto, and that no replication to said answer has been filed.

And, thereupon, it is moved by Jackson and Boyce, counsel for E. C. Anderson, Jr., *et al.*, that the said cross-bills be dismissed, and the said amended bill of the State be dismissed as to the Jacksonville, Pensacola and Mobile Railroad Company, and all other parties defendants who do not appear from the averments of said bill to be citizens of States other than the State of Florida.

And it is further moved that the cause be set down for hearing on bills, answers and exhibits.

Upon the same day, Oct. 16, a preliminary injunction was granted on petition of the receiver, restraining the Comptroller of the State of Florida from collecting taxes from the railroads in the possession of said receiver until the decision by this court of the petition filed by the receiver. Oct. 26, the petition of the Rogers Locomotive Works was argued by Mr. E. H. Grandin in favor of the same, and by Mr. W. W. Boyce in opposition thereto. Oct. 31, replications were filed by the complainant, the State of Florida, and by R. H. Johnson *et al.*

Nov. 18, the demurrers to the amended cross-bill of Boissevain *et al.*, and the motion to dismiss the cross-bills and the amended bill of the State, so far as the same relates to the J. P. & M. R. R. Co., and all other parties who do not appear from the averments of the bill to be citizens of States other than Florida, were argued by Mr. Boyce in support of the same; by Mr. Bisbee in support of the demurrer of the State to the cross-bill of R. H. Johnson *et al.*, and to the amended cross-bill of Boissevain *et al.*, and in support of the motion to strike from the files the answers of R. H. Johnson *et al.*, and in opposition to the motion to dismiss the amended bill of the State; by Mr. Wilkinson Call in opposition to the motions to dismiss the cross-bills of Johnson *et al.*, and the motion to strike from the files the answer of said Johnson *et al.*, and by Mr. W. W. McFarland in support of the cross-bill of Boissevain *et al.*, and in opposition to the motion to dismiss the cross-bill of said Boissevain *et al.*

Nov. 20, the following motion was made:

It is respectfully represented as follows:

1. That, under the Internal Improvement Act of the State of Florida of 1855, the capital stock and property of the railroads now in the possession of the receiver were exempt from state taxation for a period not yet expired.

2. That the bonds issued by the Companies originally owning said railroads were, by the 3d section of said Internal Improvement Act, to be a first lien on the road-bed and franchises of said railroad.

3. That, under the power conferred by the said 3d section of said Internal Improvement Act, the trustees of the improvement fund, for default of the Railroad Companies, offered said railroads and all their property for sale. That, at such sale, by the trustees, one Jackson and

others purchased that portion of railroad now known as the Florida Central, and in July, 1868, obtained a new charter, the new charter containing a provision that it was not to be construed to divest the State of the taxing power.

5. That the Pensacola and Georgia Railroad was bid off at the sale by the trustees, by one Dibble and others; that said purchasers failed to pay a large portion of the purchase money, although they fraudulently pretended to pay it.

6. That the unpaid first mortgage bonds of the Pensacola and Georgia Railroad are, in fact and in law, and are so considered by the State of Florida, a subsisting lien on the property of said road now known as the Jacksonville, Pensacola & Mobile Railroad.

7. That the State of Florida, through its comptroller, is proceeding to assess and collect state taxes from said Florida Central and The Jacksonville, Pensacola and Mobile Railroad Companies.

Whereupon, it is moved that the temporary injunction heretofore granted on this petition be continued until the final hearing of the cause.

This motion was argued Dec. 11, by Mr. W. W. Boyce, in support of the same.

January 11, 1875, the court made the following order:

(Title of the cause).

In this cause it was ordered:

1. That the order entered April 24, 1874, granting leave to R. H. Johnson *et al.* to make themselves parties defendant to this suit, and file such pleadings as they should be advised were necessary; the order made June 30, 1874, permitting the complainant to amend the original bill, and the order made September 30, 1874, permitting the defendants, Boissevain and others to amend their cross-bill, be, and the same are hereby rescinded, at the cost of the moving parties respectively.

2. All pleadings and motions filed under or in consequence of such orders of leave, are hereby stricken from the files.

3. The original cross-bill of Boissevain and others is dismissed, at their cost, as against the Jacksonville, Pensacola & Mobile Railroad Company, and the Florida Central Railroad Company, Corporations created and organized under and by virtue of laws of the State of Florida.

4. The injunction granted on the 16th day of October, 1874, restraining the complainant and its officers from the collection of certain contemplated taxes mentioned in the petition of Robert Walker, Receiver, filed October 2, 1874, is continued in force until the final disposition of this cause; with leave, however, to the complainant, to move at any time for a modification or vacation thereof.

5. The petition of the Rogers Locomotive Works, a Corporation, filed August 28, 1874, for an order upon the receiver to sell certain locomotives and their tenders, to pay an alleged debt due that Corporation from the Tallahassee Railroad Company for the purchase of such locomotives, etc., is denied; but such Corporation has leave to move, at any time, for the payment of any amount that, upon settlement of accounts, may be found due from said Railroad Company by reason of the alleged contract in respect to said locomotives, etc., out of any

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moneys that may be in the hands of the receiver in this cause, over and beyond the amount required for the operation and maintenance of the line of railroad which came into his possession by virtue of his appointment made herein April 24, 1874.

Per Mr. Chief Justice Waite.

Jan. 12, leave being granted, a motion was filed to withdraw the consent of Holland to the dismissal of the bill as to him. This petition set forth that said consent had been filed, pending negotiations for settlement between the State and Holland; that the motion to dismiss as to him, and said consent, had never been passed upon by the court; that Holland was informed by the solicitor of the State, that it was impracticable for the State to complete the negotiation then pending.

Jan. 25, 1875, leave being granted, Mr. Dickerson filed a motion in behalf of Mr. Gibbs to revive and re-instate an order made by the Chief Justice, May 16, 1874, which order had been suspended by the Chief Justice, June 27. This order had directed the payment, by the receiver to said Gibbs, of \$100 per week and \$250 per month. The order recited that Gibbs had built the road between Quincy and the Appalachicola River under contract, and had never surrendered the same to the Jacksonville, Tallahassee & Mobile R. R. Co., that Gibbs had recovered two judgments against said R. R. Co., and the road in his possession had been sold by the sheriff and purchased by him; that Gibbs had leased this road to Holland for the sums above named; that the receiver had been ordered to take possession of that portion of the road, and that Gibbs was willing to permit the use of the said road by the receiver, provided the receiver should pay him the above sum. This motion of Gibbs was argued Feb. 22, by Mr. E. N. Dickerson in support of the same, and by Mr. W. W. McFarland in opposition thereto. Mar. 1, the motion was denied. Mar. 22, motion was filed in behalf of D. P. Holland by E. N. Dickerson, his solicitor, that the order appointing a receiver be vacated and that the receiver deliver possession of the road west of Lake City, etc., etc., to Holland. This motion was based upon a decision of the Supreme Court of Florida in a case between the Florida Central R. R. Co. and the State.

On the same day a motion was filed by the complainants for allowance for expenses, solicitors' fees, etc. On the same day, also, was filed the petition of the Florida Central R. R. Co. by E. N. Dickerson, solicitor, alleging that it was an independent Corporation, owning the road from Jacksonville to Lake City; that it was not originally a defendant in this suit; that all its property was placed, by order of the court, in the hands of Walker, the Receiver, without any notice to it. The petitioner asked that Walker pay to the President of the Company all moneys collected by said receiver, which have accrued or may accrue from the earnings of the road prior to the appointment of a receiver; that the receiver pay proper sums for the fees or counsel, to prosecute the legal rights of the petitioner; that the receiver pay the president's and secretary's salaries while the litigation continues; that the sums which the receiver collects from the earnings of this road be exclusively applied to the road from Lake City to

Jacksonville; that the receiver deliver up the corporate seal, papers, documents, books and records of this Company to its President.

This motion, in behalf of the Florida Central, was argued Apr. 5, by *Mr. E. N. Dickerson*, in support of the same, and by *Mr. W. W. McFarland*, in opposition thereto. Apr. 6, the motion to discharge the receiver as to the interest of D. P. Holland was argued by *Mr. M. H. Carpenter*, in support of the same, and by *Mr. Bisbee*, *Mr. McFarland* and *Mr. Boyce*, in opposition thereto. Apr. 12, complainant's motion for allowance, etc., was denied. May 8, Holland's motion to discharge receiver, etc., was denied. May 8, the following order was entered:

Order of Court.

1. The Supreme Court of Florida having vacated the order of the Circuit Court of Duval County, appointing a receiver for the Jacksonville, Pensacola and Mobile Railroad Company mentioned and set forth in the bill of the complainant, and the Florida Central Railroad Company having applied to this court for a surrender to it of that part of the railroad now in the possession of the receiver in this cause, which lies east of Lake City, it is ordered that an account be taken of the earnings of that part of said railroad since the same has been in the hands of the receiver herein; of the moneys collected by the receiver on account of the earnings of that part of the road previous to his appointment; of the expense in operating the same; of the expenditures in lasting and valuable improvements thereon, and of the debts of the Florida Central Railroad Company, paid by the receiver; and that, upon the payment to the receiver, of any balance that may be found of expenditure or payment over and above the earnings, he surrender to the said Florida Central Railroad Company that part of the said road, and also any other property in his hands belonging to such Company, and its corporate seal, books, papers, documents and records. If said Company shall desire to take possession of said road and property before such account can be taken, the receiver is directed to surrender the same upon receiving from said Company a bond to the United States in the penal sum of \$50,000, with sureties to the satisfaction of the Justice of this court assigned to the Fifth Circuit, conditioned for the payment of any sum that may be found to be due when such account shall be taken and stated.

2. Jacqueline J. Daniel is hereby appointed to take and state such account, with the usual powers of a master in such cases.

3. It is also further ordered that the receiver pay to said Florida Central Railroad Company, out of any moneys that may come into his hands not required to pay the operating expenses of the railroad, any balance that may be found due to it for earnings, over expenditures and payments, upon the statement of such account.

4. The motion of the defendant, Holland, to discharge the receiver upon that part of the road lying west of Lake City, is denied.

5. The *Chief Justice* of this court is authorized and empowered during the vacation to make and allow all such interlocutory motions, orders, rules and other proceedings as, by the general rule of chancery practice or by the

rules prescribed by this court for the circuit courts or courts of equity, can or may be had or done by a judge in chambers or at any time or place when the court is not in term or in session; and also to name a master to take testimony in the cause, in accordance with the order made herein on the 12th day of April last.

Oct. 19, the petition of John Darby was filed, representing that the Florida Central Road had purchased from the Dawson Manufacturing Company a number of freight cars; that, as part payment for the same, certain promissory notes were given, which the petitioner indorsed; that the title to said cars was placed in an individual, E. M. L'Engle, Esq., who transferred them to F. B. Papy, Esq., as trustee to hold them, and collect from the said R. R. Co. rents for their use, and to apply such rents to the payment of the notes; that said trustee surrendered the cars to the receiver appointed by this court; that, at the maturity of the notes and default of payment, the Dawson Manufacturing Co. recovered judgment against the Florida Central Railroad Co. and the petitioner, and execution was issued thereon; that the property of the R. R. Co. is in the hands of the receiver and not liable to the execution. The petitioner asks that the receiver be directed to pay, out of any funds in his hands, the said execution.

This petition was argued Oct. 27, by *Mr. E. M. L'Engle*, in support of the same.

Oct. 28, the court made the following order:

"On consideration of the petition of John Darby, filed herein, and of the agreement of counsel thereupon had in support of the same, it is ordered that the receiver in this cause return to F. B. Papy, Esq., trustee, any moneys received by him from said Papy, on account of the earnings of the cars in the petition mentioned previous to his appointment and also pay to said Papy a fair and reasonable compensation for the use of said cars during the time the same had been in his possession and used by him. It is also further ordered, that he restore the said cars to the possession of the party or parties from whom he received them, with full authority on his part, however, to make such contract for the use thereof during the remainder of his receivership as to him shall seem best under the circumstances."

Per *Mr. Chief Justice Waite*.

The cause came on for final hearing Oct. 28, and was argued on that and the succeeding day by *Mr. H. Bisbee, Jr.*, for the complainant, and by *Messrs. H. R. Jackson* and *W. W. Boyce*, for the respondents; also, by *Mr. M. H. Carpenter*, for respondent, Holland.

Mr. Justice Bradley delivered the opinion of the court:

This is a bill in equity filed by the State of Florida (by its Attorney-General), on behalf of the said State and of the trustees of the internal improvement fund of the State, against Daniel P. Holland and Edward O. Anderson and others, citizens of Georgia. Sherman Conant, the Marshal of the United States for the Northern District of Florida, is made a formal defendant by reason of having in his hands an execution at the suit of some of the other defendants.

The subject-matter of the suit is a line of railroad in Florida extending from Jacksonville westwardly to Quincy about one hundred and ninety miles, with a branch from Tallahassee to St. Mark's of twenty-one miles. It consists of three divisions, originally built and owned by different companies. The first sixty miles from Jacksonville to Lake City, was built and owned by the Florida, Atlantic and Gulf Central Railroad Company; the second division from Lake City to Quincy, by the Pensacola and Georgia Railroad Company; and the branch, from Tallahassee to St. Mark's, by the Tallahassee Railroad Company. These companies were chartered in 1853; and after the passage by the State Legislature, Jan. 6, 1855, of a certain Act entitled "An Act to Provide for and Encourage a Liberal System of Internal Improvements in this State," they severally availed themselves of its provisions, and issued bonds which were duly guarantied by the trustees of the internal improvement fund created by the Act. This fund consisted of the five hundred thousand acres of public lands which became vested in the State under the grant made by Congress for the purposes of internal improvement by the Act of Sep. 4, 1841, 5 Stat. at L., 455, and of some fifteen millions of acres of swamp and overflowed lands granted by Act of Congress of Sep. 28, 1850, to enable the State to construct the necessary levees and drains to reclaim the same. 9 Stat. at L., 519. By the Internal Improvement Act of Jan. 6, 1855, above referred to, these lands and their proceeds were constituted a distinct and separate fund, to be called "The Internal Improvement Fund of the State of Florida," and were vested in the Governor of the State, the Comptroller, Treasurer, Attorney-General and Register of State Lands, and their successors in office, in trust to dispose of the same, and invest the proceeds, with power to pledge the fund for the payment of the interest on the bonds (to the extent of \$10,000 per mile) which might be issued by any railroad companies constructing roads on certain lines indicated by the Act. The companies, after completing their roads, were to pay, besides interest on their bonds, one per cent. per annum on the amount thereof, to form a sinking fund for the ultimate payment of the principal. The Act declared that the bonds should constitute a first lien or mortgage on the roads, their equipment and franchises; and, upon a failure on the part of any railroad company accepting the Act to provide the interest and the payments to the sinking fund as required thereby, it was made the duty of the trustees to take possession of the railroad and all its property, and advertise the same for sale at public auction.

In the management of the fund the trustees were to fix the price of the lands, having due regard to their location, value for agricultural purposes, etc., and make such arrangement for drainage of the overflowed lands as in their judgment might be most advantageous to the fund and the settlement and cultivation of the land; and they were directed to encourage actual settlement and cultivation of the lands by allowing presump-tions under such rules and regulations as they might deem advisable, but not more than one section of land to any one settler. Other duties of a public character in re-

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lation to the lands were devolved upon the trustees by subsequent enactments.

At the close of the war, the railroads were in a dilapidated condition; and, the companies having failed to pay the interest and the installments due to the sinking fund on their bonds, the roads were seized and sold by the trustees under the provisions of the Act. The first section, from Jacksonville to Lake City, was sold in 1868, and the purchasers procured an Act of incorporation under the name of The Florida Central Railroad Company. The other two sections were sold on the 20th of March, 1869, for an amount equal to the principal of the outstanding guarantied bonds issued on them; and, the purchasers being allowed the privilege of paying the purchase money by delivering the bonds at their par value, nearly \$1,000,000 of them were thus surrendered and canceled. But a balance of about \$472,000 remained unpaid. By some contrivance of the purchasers (which both the complainants and E. C. Anderson and his associates agree in characterizing as fraudulent), this balance was not paid at all, but was only formally settled by inducing the agents of the trustees to accept a check for the amount, upon the receipt of which they delivered to the purchasers a deed for the property which had been executed for that purpose and placed in their hands, and the purchasers possessed themselves of the road. This check was never paid. Anderson and others, defendants, or represented in this cause, hold upwards of \$800,000 of the still outstanding guarantied bonds of the Pensacola and Georgia and Tallahassee Railroad Companies, which the purchasers failed to deliver up, besides \$108,000 which are in dispute.

The purchasers of the Pensacola and Georgia and Tallahassee Railroads, and their associates or assigns, applied to the Legislature of Florida for a new charter, which was granted to them with the name of The Tallahassee Railroad Company; but after a few months, having procured another charter with enlarged powers, creating a corporation by the name of The Jacksonville, Pensacola and Mobile Railroad Company, they consolidated their interests with that company as early as May or June, 1870, and have ever since been known under that designation. It is conceded by Anderson and the other bond holders, and is clearly the result of the evidence in the case, that this company, whilst it succeeded to the rights of the purchasers at the trustees' sale, received the property subject to the vendor's lien for the payment of the balance of the purchase money due on that sale. An adjudication to this effect has been made against the company in the suit in Duval County Circuit Court, hereinafter referred to.

The Act which incorporated the Jacksonville, Pensacola and Mobile Railroad Company authorized that company to consolidate and acquire all the roads before mentioned, and to extend the same from Quincy westward to the western boundary of the State in the direction of Mobile; and, with a view to aid the company in the completion of this work, the same Act, as amended by an Act passed Jan. 28, 1870, authorized the Governor of the State to loan to it the bonds of the State to an amount equal to \$16,000 per mile, in exchange for an equal amount of first mortgage bonds of the company. In order to secure the principal and

interest of the company's bonds, it was declared that "The State of Florida shall, by this Act, have a statutory lien, which shall be valid to all intents and purposes as a first mortgage, duly registered, on the part of the road for which said bonds were delivered, and on all the property of the company, real and personal, appertaining to that part of the line which it may now have or may hereafter acquire, together with all the rights, franchises and powers there-to belonging; and, in case of failure of the company to pay either principal or interest of its bonds or any part thereof for twelve months after the same shall become due, it shall be lawful for the Governor to enter upon and take possession of said property and franchises, and sell the same at public auction."

Under this power, state bonds to the amount of \$4,000,000 were delivered to the company in exchange for \$3,000,000 of the company's bonds and \$1,000,000 of the bonds of the Florida Central Railroad Company, and have been in whole or in part disposed of.

The balance of purchase money accruing on the trustees' sale still remaining unpaid, and the Jacksonville, Pensacola and Mobile Railroad Company having also failed to pay the interest on their bonds, delivered in exchange for State bonds as aforesaid, a suit was instituted in March, 1872, by the State of Florida and the trustees of the internal improvement fund against the company, in the Circuit Court of Duval County, at Jacksonville, to recover, by a sale of the railroad, the said balance of purchase money, which was claimed to be a lien thereon. By an amended complaint, all known parties having liens against the railroad were made defendants. Anderson and the other first mortgage bond holders, who are defendants in this suit, were not made parties, because their interest was not then deemed adverse to that of the State. Holland was not made a party, because at that time he claimed no interest in the property. On the commencement of this suit, the Duval County Circuit Court appointed Jonathan C. Greeley, Receiver, to take possession of the railroad and secure its receipts and earnings. But immediately a crop of litigation sprang up, hostile to the rights asserted by the State and trustees. It was contended that the territorial jurisdiction of the court did not extend beyond the county limits, and that the authority of the receiver was limited thereby; and that the Florida Central Railroad Company was not consolidated with the Jacksonville, Pensacola and Mobile Railroad Company; and other positions antagonistic to the rights and proceedings of the State were assumed, and suits were commenced in various courts to carry out these views. Amongst others, the Leon County Circuit Court (at Tallahassee) entertained a suit brought by some first mortgage bond holders, and appointed a receiver, who took possession of the western part of the road. The result was, that the receiver appointed by the Duval County Court was dispossessed of the entire line.

At this point, in July, 1872, the defendants, Anderson and his associates, commenced a suit in the Circuit Court of the United States for the Northern District of Florida against the Jacksonville, Pensacola and Mobile Railroad Company, and the trustees of the internal improvement fund, upon the first mortgage bonds

held by them, claiming that these bonds were still a lien on the railroad, or at least entitled the holders to claim the unpaid purchase money before referred to, and praying a sale of the road to pay their demand. The trustees pleaded to the jurisdiction of the court, alleging for cause, amongst other things, that it appeared by the bill and exhibits that the subject-matter of the bill was in the jurisdiction and possession of a circuit court of the State. The bill was thereupon voluntarily dismissed as against the trustees; and, by an arrangement made with the railroad company (which withdrew its answer), the complainants obtained a consent decree on the 19th of December, 1872, declaring the bonds a first lien on the railroad, and directing it to be sold to pay the same. An execution was issued on this decree and placed in the marshal's hands, and a sale of the property was advertised. In September, 1873, Anderson and his associates filed in the same court another bill to carry into execution their said decree, making the trustees of the internal improvement fund defendants, charging them with an intent to seize the railroad, and praying an injunction against their so doing.

Meantime the defendant, Holland, had commenced a suit in the said Circuit Court of the United States against the Jacksonville, Pensacola and Mobile Railroad Company, to recover compensation for alleged services; and on the 2d of December, 1872, he recovered a judgment by default for over \$60,000, and issued execution thereon. Under this execution the marshal advertised and sold the whole railroad in May, 1873; and Holland became the purchaser for the price of \$20,000, and entered into possession. By an arrangement made with Anderson and his associates, Holland kept possession until the appointment of a receiver by this court.

Under these circumstances the State of Florida filed the bill in this suit, setting forth the principal facts before rehearsed, and praying that the sale under Holland's judgment might be declared null and void, and that he might be enjoined from setting up any rights under it; that the decree obtained by Anderson and others might be set aside and declared null and void, and that they might be enjoined from setting up any rights under it. The bill having stated that the principal of the internal improvement bonds held by the defendants was not yet due, and would not be due for many years to come, the complainant prayed the court further to decree that the defendants have no right to payment of their principal until their bonds mature; and that they are bound to resort to the internal improvement fund as a primary fund for the payment of both principal and interest before resorting to the railroad. The bill concludes with a prayer for alternative and general relief.

It having become manifest to us in the course of the proceedings that the interest of all parties required that the fund in litigation should be under the control of this court, we appointed a receiver to take charge of the railroad, and operate the same.

A demurrer to the bill having been overruled, answers were filed by the defendants, and proofs taken; and the case is now before us on the pleadings and the evidence.

It is not our purpose to discuss minutely the questions of fact that have been raised by the

parties. The most material questions are either conceded by all the parties, or are so free from doubt as to render such discussion unnecessary. Our conclusions thereon will become manifest as we proceed to give our general views upon the case.

The first question which naturally presents itself is, whether the State of Florida has such an interest in the subject-matter of the suit, and in the controversy respecting the same, as to give it a standing in court. It is suggested that the trustees of the internal improvement fund are the only parties legally interested, and that they have no right to bring an original bill in this court. To this it may be answered, in the first place, that the State has a direct interest in the subject-matter, the railroad in question, by reason of holding, as it does, the four millions of bonds which are a statutory lien upon the road. In the next place, the interest of the State in the internal improvement fund is sufficiently direct to give it a standing in court, whenever the interests of that fund are brought before a court for inquiry.

From the statement already made in reference to the history and character of this fund, and the duties of the trustees in regard to it, it is apparent that the trustees are merely agents of the State, invested with the legal title of the lands for their more convenient administration; and that the State remains in every respect the beneficial proprietor, subject to the guaranties which have been made to the holders of railroad bonds secured thereby. The residuary interest in the fund belongs to the State. The fact that the trustees consist of the Governor and other executive officers, and that they are charged with the duties of drainage, reclamation and settlement of the public lands (duties of a purely public character), shows that they are mere public agents invested with an important branch of the state administration.

Now, to protect its interests, it is competent for the State, seeking equitable relief against citizens of another State, to file an original bill in this court. The reference to the trustees in the bill cannot affect the jurisdiction of the court, inasmuch as they are not the litigants before it. It has frequently been decided in the circuit courts, where the jurisdiction depended on the citizenship of the parties, that such jurisdiction is not ousted, where there has been occasion to make a formal party of a sheriff or other public officer by reason of his having a writ of execution, or being named as obligee in an official bond sued for the benefit of private parties, provided that the real parties to the litigation have the requisite citizenship. Thus an administration bond given to the surrogate or to the Governor of a State may be sued in his name in the Circuit Court of the United States, though not having the requisite citizenship, if the party for whose benefit the suit is prosecuted has the requisite citizenship. These authorities apply equally to the case of the marshal who was named in the bill, but against whom no relief was sought. Several of the cases are reviewed in the recent case of *The Coal Co. v. Blakely*, 11 Wall., 179 [78 U. S., XX., 179]; and a further discussion of the subject at this time is unnecessary.

We come, then, to the principal question in the case, which is, whether upon the pleadings
See 1 Q. 10.

and evidence in the case the complainant has ground for the relief sought, or for analogous relief, admissible under the general prayer of the bill.

The equitable lien for the unpaid purchase money accruing upon the trustees' sale of the railroad in 1869 resulted primarily to the trustees as the vendors, and became binding on the road in the hands of all subsequent purchasers taking with notice of the non-payment. As before stated, the Jacksonville, Pensacola and Mobile Railroad Company undoubtedly took the property subject to this lien; and it has been so decided in the Duval County suit. The defendant, Holland, stood in no better situation. He had full knowledge of the circumstances before obtaining his judgment, and purchased only the right, title and interest of the company. His claim to hold the property clear of the lien, and to take the rents and profits, when the State is seeking to have the road and profits secured and applied to the satisfaction thereof, is inequitable and unjust. Independent of any claim of the State under the \$4,000,000 of bonds issued in 1870, he has no right to oppose it in its efforts to secure satisfaction of the original purchase money of the property. His judgment may be perfectly valid as against the railroad company, and he may have acquired under it all the right, title and interest of said company; but nothing more. As against the claims of the State, he has no right to appropriate to himself the possession and emoluments of the property. His employment of judicial process for that purpose even though the powers of the receiver should be successfully controverted, is inequitable so long as the rights of the State are sustained, or not disaffirmed by the proper courts.

As to the bonds given by the railroad company to the State in 1870 in exchange for its bonds, Holland does not directly question their validity, though he insists that the latter were issued in violation of the Constitution of the State. The validity of these bonds is a delicate question, and one which it is eminently proper that the courts of Florida should determine. The judges of the Supreme Court of that State, in answer to certain questions propounded by the Governor, in accordance with a provision of the State Constitution, have given an official opinion which has been generally understood as favorable to the validity of the bonds. Until that court shall decide the contrary, we prefer to take that view; and, regarding the bonds of the company as valid and binding, the right of the State as against the pretensions of Holland to control the possession and emoluments of the property cannot be doubtful. Should the state courts hereafter determine against the validity of those bonds, further consideration of the subject can be had. Of course, if it were necessary to do so, this court would not hesitate to pass upon that question; but we do not deem it necessary in this suit, which, in its nature, is rather to be regarded as ancillary to the judicial proceedings adopted by the State in Florida.

The position of Anderson and his associates is different. They claim that their bonds are still a first lien on the railroad, notwithstanding the trustees' sale; and that, at all events, though the principal of their bonds is not due, they are entitled to prosecute the lien for the unpaid

purchase money due on said sale in order to obtain satisfaction of their bonds. They claim that their right to do this is paramount to that of the State or the trustees, inasmuch as the amount to be recovered is applicable to the payment of the said bonds; and this is really the question at issue between these parties. Its solution requires that we should examine a little more carefully the precise nature of the guaranty given to the bonds, and chargeable upon the internal improvement fund. The entire 8d section of the Act of Jan. 6, 1855, on which the controversy principally depends, is as follows:

"Sec. 8. *Be it further enacted*, That all bonds issued by any railroad company under the provisions of this Act shall be recorded in the comptroller's office, and so certified by the comptroller, and shall be countersigned by the State Treasurer, and shall contain a certificate on the part of the trustees of the internal improvement fund that said bonds are issued agreeably to the provisions of this Act, and that the internal improvement fund, for which they are trustees, is pledged to pay the interest as it may become due on said bonds. All bonds issued by any railroad company under the provisions of this Act shall be a first lien or mortgage on the road-bed, iron, equipment, workshops, depots and franchise; and upon a failure on the part of any railroad company accepting the provisions of this Act to provide the interest as herein provided on the bonds issued by said company, and the sum of one per cent. per annum as a sinking fund, as herein provided, it shall be the duty of the trustees, after the expiration of thirty days from said default or refusal, to take possession of said railroad and all its property of every kind, and advertise the same for sale at public auction to the highest bidder, either for cash or additional approved security, as they may think most advantageous for the interests of the internal improvement fund and the bond holders. The proceeds arising from such sale shall be applied by said trustees to the purchase and canceling of the outstanding bonds issued by said defaulting company, or incorporated with the sinking fund; *provided* that, in making such sale, it shall be conditioned that the purchasers shall be bound to continue the payment of one half of one per cent. semi-annually to the sinking fund until all the outstanding bonds are discharged, under a penalty of the annulment of the contract of purchase and the forfeiture of the purchase money paid in."

Of course, the company giving the bonds is primarily liable to the bond holders for principal and interest as they become due, inasmuch as the bonds import on their face an absolute promise to pay; and, on failure to pay, suit may be instituted at once against the company. Back of this personal liability of the company, the bond holder has a double security: first, the guaranty of the internal improvement fund; and, second, the statutory lien on the railroad. He cannot avail himself of the latter directly, as he could if it were a mortgage given to secure the bonds alone; but he must induce the trustees to act in the mode pointed out by the statute. If they refuse to act when they ought to do so, the bond holder may either compel them to act by *mandamus*, or file a bill in

equity to obtain the relief to which he may be entitled.

It is seen, however, that the primary right to proceed against the property is in the trustees, and not in the bond holders. But if principal or interest become due and be unpaid, and the trustees have not the means to pay it from any available resources of the internal improvement fund in one case, or the sinking fund in the other, it will be their absolute duty to proceed against the property.

In the present case, the trustees did initiate proceedings, and did sell the property by virtue of the lien created by the statute; and through that sale they succeeded in extinguishing a large amount of the outstanding bonds. But the purchasers failed to pay the entire purchase money, and a vendor's lien attached. The original lien of the bonds was consummated and merged in the title which the purchasers acquired by the sale. Anderson and company cannot set it up anew without repudiating the sale and bringing back upon the property, in co-existence with their own claim, the lien of the \$1,000,000 of bonds which have been canceled. This, it is presumed, they are not prepared to do. Indeed, they nowhere attempt to repudiate the sale. They claim that, notwithstanding the sale, the lien of their bonds still subsists. But this cannot be. The sale was made by virtue of the joint statutory lien of all the bonds, and vested in the purchasers a title clear of them all, subject only to the vendor's lien for the purchase money. As already seen, by the Internal Improvement Act, only the interest of the bonds is guarantied upon the credit of the internal improvement fund; the principal is provided for by the creation of the sinking fund, which is a charge on the road in the hands of all purchasers until the bonds are satisfied. When a sale is made by the trustees for non-payment of interest or sinking fund, and the principal of the bonds is not due, they have an option (of course, after satisfying the arrears of interest) either to purchase up and retire the bonds, or to pay the balance into the sinking fund, and postpone the payment of the principal until the bonds arrive at maturity. Which of these two things they shall do is entirely in their discretion; and a purchase by them of a portion of the bonds does not impose upon them the obligation to purchase the balance. Nor does a resolution to purchase bonds, formed at one time, preclude them from changing that resolution at a subsequent time. The contrary position assumed by the defendants we consider as untenable, and repugnant to the spirit of the Act.

In the present case, as we have seen, the principal of the bonds is not due; and, if the trustees should collect the balance of purchase money to-day, it would be in their option to purchase the bonds or not. There is no stipulation in the bonds that the principal shall become due by the non-payment of the interest. The getting of a consent decree by the bond holders for the sale of the road to pay their bonds, and especially the principal thereof, in a proceeding in which neither the State nor the trustees were represented, and when the latter were pursuing their lawful remedy to subject the road to the payment of the purchase money (as was their duty to do), was an *intelligible* in-

interference with and a fraud upon their rights.

We are of opinion, therefore, that the defendants ought to be enjoined from selling, taking possession of, or interfering with the railroad property in question (that is to say, the line of railroad extending from Lake City to the Chattahoochee River, and from Tallahassee to St. Mark's), so as in any manner to impede, obstruct or hinder the State of Florida, or the trustees of the internal improvement fund, in taking possession of the property, or in procuring it to be condemned and sold for the purpose of raising and paying the unpaid purchase money, and such amount as may be adjudged or decreed by the proper courts or tribunals in that behalf to be due to the State upon the bonds delivered to its officers by the Jacksonville, Pensacola and Mobile Railroad Company, under the Act of Jan. 28, 1870.

A decree will be made accordingly.

It will also be proper to continue the receiver appointed by this court until the property can be delivered up to some proper and competent officer or persons having the requisite authority to receive the same.

The decree should contain a proviso that it is not intended to preclude the right of Anderson and the other first mortgage bond holders to demand and receive from the State or the trustees, out of the proceeds of said property, or of said internal improvement or sinking funds, respectively, any amount of principal or interest which may be or may become due on their bonds; nor to affect the validity of their decree in the circuit court, except as above stated.

DECREE.

This cause coming on for hearing upon the pleadings and proofs, and being argued by *Mr. Bisbee* for the complainant, and by *Messrs. Jackson, Carpenter and Boyce* for the defendants, and the court having considered of the same, it is now, on this 13th day of December, 1875, ordered, adjudged and decreed that the defendants, and each of them, be perpetually enjoined from hindering or interfering with, or disturbing the State of Florida, or any of its officers or agents (including the trustees of the internal improvement fund of said State), or any officer or receiver appointed or acting in its behalf, in the possession, management or control of the railroad of the Jacksonville, Pensacola and Mobile Railroad Company, extending from Lake City westwardly to or beyond the Chattahoochee River, and from Tallahassee to St. Mark's, with the appurtenances thereof and property belonging thereto; and that Edward C. Anderson, Jr., and others, defendants herein, holders of first mortgage bonds of the Pensacola and Georgia and Tallahassee Railroad Companies, in whose favor a decree was rendered in the Circuit Court of the United States for the Northern District of Florida on the 19th day of December, 1872, directing amongst other things a sale of said railroad, be perpetually enjoined from selling, or procuring to be sold, said railroad and property under or by virtue of said decree, or any decree supplementary thereto in the same case: *provided*, however, that nothing herein is intended to preclude the right of the said Anderson and others to demand and receive from the State of Florida or the said trustees, out of the proceeds of said property, or of said internal improvement fund, See: 1 Otto.

or the sinking fund provided in that behalf, respectively, the principal and interest which may be or may become due on their said bonds; nor to affect the validity of the said decree, except as above expressed: and *provided*, further, that this decree is not intended to prejudice the right of the defendant, Daniel P. Holland, to contest in any competent court or proceeding the validity of the bonds issued by the Jacksonville, Pensacola and Mobile Railroad Company in exchange for the bonds of the State of Florida under the Act of the Legislature of said State passed Jan. 28, 1870, recited in the pleadings in this cause; nor to prejudice any right which said Holland may have to redeem said railroad by the payment of the unpaid purchase money mentioned in the said pleadings, with all interest thereon and lawful charges on said road, in case it should be adjudged that the said bonds are invalid.

It is further ordered and decreed, that the legal costs and charges of the State of Florida in this cause, and the fees and costs due to the officers of this court therein, be allowed and paid out of the moneys in the hands of the receiver.

It is further ordered, that the receiver do pay out of the moneys in his hands the lawful fees and charges of the master who took the depositions and proofs in the cause; and that he settle his accounts before the clerk of this court, subject to the direction and approval of the *Chief Justice*.

And all further equities and directions arising upon the decree are hereby reserved.

Cited—103 U. S., 138; 8 Wood, 700.



AUGUST F. LUDWIG ET AL., *Appls.*,

v.

THE PROPELLER FREE STATE, HER ENGINE, ETC., THE WESTERN TRANSPORTATION COMPANY, Claimants.

(See S. C., "The Free State," 1 Otto, 200-206.)

Collision—rules of navigation—steamer's duty.

1. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such direction as to involve risk of collision, the steamship shall keep out of the way of the sailing ship, which must hold its course and rely upon the steamship to avoid a collision.

2. The steamer is not bound to take any steps to avoid a collision until danger of a collision is apparent.

3. It is not the law that a steamer must change her course or slacken her speed the instant she comes in sight of another vessel, if there is no danger of collision.

[No. 66.]

Argued Dec. 7, 8, 1875. Decided Jan. 10, 1876.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The libel in this case was filed by the appellants, owners of the scow C. G. Meisel, for a collision between it and the propeller Free State.

NOTE.—Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to St. John v. Paine, 51 U. S. (10 How.), 557.

The facts are fully stated by the court.

The District Court for the Eastern District of Michigan, in which court the libel was filed, rendered a decree in favor of the libelants for one half the amount of their damages. The claimants appealed to the circuit court. The libelants did not appeal. The circuit court reversed the decree of the district court and dismissed the libel. The libelants now appeal to this court.

Mr. W. A. Moore, for appellants.

Messrs. Geo. B. Hibbard, Ashley Pond and Henry B. Brown, for appellee.

Mr. Justice Hunt delivered the opinion of the court:

There is but a single question of fact in issue between the parties, and that is as to the course and conduct of *The Meisel* shortly before the collision.

There is but a single question of law in the case, and that is as to the duty of the propeller under the 16th of the articles established by Congress for avoiding collisions of vessels.

The facts, as established by the evidence on both sides and which cannot justly be disputed, are as follows: about daybreak on the morning of July 17, 1870, the weather being fine and free from fog, the sailing scow *Meisel* entered the Detroit River on her voyage from Lake Erie to a port on Lake Michigan. The wind was west-southwest, free to the scow, and she sailed in a course generally north, but by the marks upon the land, which were well known to her captain and plainly visible, rather than by the compass, keeping nearer to the Canadian than the other shore. As she passed the Village of Amherstberg, the steamer *Jay Cooke* came out from the dock at that place, and passed the scow on her starboard side, at a distance of twice or three times the length of the steamer. The propeller *Free State* was then approaching on her passage down the river. As the steamers approached each other, *The Jay Cooke* gave one blast of her whistle, which was responded to by *The Free State* by the same signal. This indicated that the steamers would pass each other port to port. After *The Cooke* had passed away from her, the scow ported her helm to get into the wake of *The Cooke*. As the propeller approached nearer, a second order to port was given by the master of the scow; and she was sailing under this order when she was struck by the propeller on her port side, near the main rigging. The scow was sunk by the collision, and the wife and child of the master were drowned.

The propeller *Free State* was on her voyage down the lakes from Chicago to Buffalo; was making nine or ten miles an hour when she sighted *The Meisel*. The scow showed her green light only as she came in sight of the propeller. As she passed *The Cooke*, the propeller *Free State* bore to the Canada shore, intending to leave the scow to windward. As the propeller was thus bearing to port, the scow changed her course to port, as already mentioned. The master of the propeller ordered her helm hard a-port, and rang the bell to stop and back. It was then too late to avoid a collision.

The point of fact in dispute is this: as *The Cooke* was passing her, as already stated, did the scow put her helm to the starboard, thus

changing her direction to the west, and authorizing the propeller to believe that she would continue to hold her course westerly, so that it became the duty of the propeller to pass her on her starboard side?

We are of the opinion that she did, not only on the testimony of all on board the propeller, but by the testimony of the master and mate of the scow. The evidence of the master shows that, as she entered the Detroit River, the course of the scow was northerly, the wind being west-southwest, the sails on her starboard side and within two hundred or three hundred feet of the Canada shore. He says that, when *The Cooke* passed him, the propeller was three hundred or four hundred feet distant between him and the shore; that, as soon as *The Cooke* had passed, he ordered the man at the wheel to keep her off a little; that she swung right off to the mainland, the Canada side. He told him to steady, and he did so. *The Cooke* had, before this, blown the single whistle; and the captain says he supposed he could follow in her track, and pass the propeller on the port side.

This master does not state distinctly, nor does he deny the very obvious fact that, as *The Cooke* began to pass him, he put his helm to the starboard, and bore up into the wind. Such must have been the fact, as he was previously steering as nearly north as might be, in the same course with *The Cooke*; and after she had passed him, it was necessary to port his helm to bring him again into that line. He was out of the line, and could only have been so by starboarding his helm as *The Cooke* was passing him. *The Cooke* was three hundred or four hundred feet from him; and, as she preserved a safe distance from the shore, the scow was probably about the middle of the channel when *The Cooke* had passed her.

The mate is more explicit. He says that, as *The Cooke* was coming up under their quarter, the captain gave the order to keep her up a little, so as to give *The Cooke* more room, and that under this order she swung to port between two and three points of the compass, and ran under that order till *The Cooke* had passed them. How long a period of time this was, or what distance of travel it covered, is not stated. *The Cooke* had just come out of the dock at Amherstberg, and probably had not acquired much speed. The scow was a free sailer, as is stated, handled well and easily; and, with all sails drawing, she was under way. As *The Cooke* began to lap her quarter, she bore to the west and so continued till the *Cooke* had entirely left her. Although we do not know the time or the distance that they so sailed together, we do know that it was so long and so far, first, that *The Cooke* escaped entirely from her; and, second, that the propeller deemed her then course to be the course adopted by the scow; that she would continue upon that course; and that, to pass her safely, she must shape her own course to the eastward.

Supposing her original direction to have been due north, a variation of three points to the west—as stated by the mate—would have carried the scow to northwest by north three thirty second parts ($\frac{3}{32}$), or nearly one tenth of a circle westerly of her former course.

The propeller, assuming that the scow would continue her course of northwest by north,

bore to the east, intending to pass between the scow and the Canada shore; which she could have done easily and safely, had the scow so continued her course. The subsequent order, however, to keep off the scow, frustrated this intention, and produced the collision.

This somewhat tedious statement of the facts of the case determines not only that the scow was in the wrong and the propeller in the right in the particulars we have considered, but will aid materially in settling the point of law which is in dispute between the parties. That question arises upon the sixteenth of the Rules enacted by Congress for avoiding collisions. It is in these words: "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam ship shall, when in a fog, go at a moderate speed." 13 Stat. at L., 60, 61.

It is contended that here was risk of collision; that the propeller did not slacken her speed or stop and reverse in time, and hence that she was also in fault, and the damage should be apportioned. A collision did certainly occur; but was the situation of the parties such that the principle of this article applied to the propeller? Does this article contemplate a case where a collision is the result of sheer negligence, and disobedience of well known rules? or does it apply to cases, where, supposing the parties intend to perform and do reasonably perform their respective duties, the emergency is such that there is still danger that a collision may occur?—as if, instead of their being, as was the fact, but the three vessels—The Cooke, The Meisel and the propeller—within a mile of the scene of action, and with a channel a thousand feet in width, there had been two other sailing vessels alongside of or immediately in the rear of The Meisel. The Meisel, as The Cooke approached, bore off to the west. If one of the other supposed vessels had borne to the east, and the third had continued a northerly course, the propeller would have been placed in an embarrassing position. If she should bear westerly, she would meet The Meisel; if easterly, she would encounter the second vessel; and, if she continued her course without variation, she would be upon the third supposed vessel. It would be the plain duty of the propeller under these circumstances, in compliance with the sixteenth article, to slacken her speed, to stop and reverse if necessary, and wait until time should point out the safe course to be pursued. It would be a case involving risk of collision.

The fifteenth article provides that "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." It has been repeatedly held under this article, that the sailing vessel must hold its course, and rely upon the steamship to avoid a collision. This is not only the right of the sailer, but it is its duty; and the steamer is bound to believe that the sailer will so act, and may manage its own vessel upon that supposition. (See authorities below.)

The scow, after The Jay Cooke had reached her, stood up the river upon a course of north-west by north. The steamer was coming down See 1 Otto.

the same stream in a direction nearly south. Observing that the scow was sailing in the direction mentioned, the steamer starboarded her helm, thus bearing to the east of south. On these courses there was no risk of collision with the scow. There was no possibility of collision. The faster and the farther the vessels sailed, the farther apart were they. The vessels adopted the principle of the fifteenth article: the scow selected her course; and the steamer, acquiescing in that selection, took the suitable means to pass her in safety. There was no risk of collision. The sixteenth Rule did not come into use; and it was not necessary that the steamer should slacken, stop or reverse.

Subsequently, and when the vessels were within three hundred feet of each other, and probably within three minutes of time, the scow changed her course, and practically ran under the bows of the steamer. Then there was risk of collision, but not until then. The steamer, in this emergency, did stop and reverse; but the time was too short and the distance too small to prevent the catastrophe.

To permit a risk of collision under circumstances like these before us is of itself a fault. There is no evidence that there was another vessel within a mile of the three we have mentioned. The channel was a thousand feet wide; and it was the duty of the steamer to shape her course so as to avoid all risk before the vessels were so near each other that any risk could arise. She would have been greatly in fault if she had permitted the point of slackening or stopping and reversing to arise.

The Nichols, 7 Wall., 656 [74 U. S., XIX., 157]; *The Scotia*, 14 Wall., 170 [81 U. S., XX., 822]; *The Potomac*, 8 Wall., 590 [75 U. S., XIX., 511].

The appellants insist that the rule of law is this: that where a steam vessel is approaching another vessel, and where a collision might be produced by a departure of the latter from the rules of navigation, the former vessel is bound to slacken her speed, or stop and reverse.

We have examined with care the authorities cited by the appellants; but we find none that sustain this proposition. The rule is otherwise.

If two steamers are meeting each other end on or nearly so, where there is plenty of sea-room, and at a considerable distance from each other, it is not the duty of either to stop, reverse or to slacken. The duty of each is to pass on the port side, and the rate of speed is not an element in the case. The risk of collision is not present under such circumstances.

In the case of *The Scotia*, above quoted, the court say, "This duty of a steamer to keep out of the way implies a correlative obligation to the ship to keep her course, and to do nothing to mislead. Nor is the steamer called to act except where she is approaching a vessel in such a direction as to involve a risk of collision. She is required to take no precautions when there is no apparent danger. Was *The Scotia*, then, in fault? We have already said that she was not bound to take any steps to avoid a collision until danger of a collision should have been apparent; and we think there was no reason for apprehension until the ship's light was seen closing in upon her. * * It is not the law that a

steamer must change her course or must slacken her speed the instant she comes in sight of another vessel, no matter in what direction it may be." See, also, *The Jesmond v. The Earl of Elgin*, L. R. 4 P. C., 1; *The Potomac* [*supra*]; *Williamson v. Barrett*, 18 How., 101.

The judgment of the Circuit Court was right, and must be affirmed.

Cited—2 Flipp., 253; 89 Pa. St., 85.

DAVID H. MITCHELL, *Plff. in Err.*,

v.

THE BOARD OF COUNTY COMMISSIONERS OF LEAVENWORTH, KANSAS; ALEXANDER REPINE, TREASURER, AND THOMAS LEONARD, SHERIFF OF SAID COUNTY.

(See S. C., 1 Otto, 206-208.)

U. S. notes exempt from taxation—equity.

1. United States notes are exempt from taxation by or under state or municipal authority.

2. A court of equity will not knowingly use its extraordinary powers to promote any scheme devised by a person to escape his proportionate share of the burdens of taxation.

[No. 70.]

Submitted Dec. 10, 1875. Decided Jan. 10, 1876.

IN ERROR to the Supreme Court of the State of Kansas.

The plaintiff in error filed a bill in one of the district courts of Kansas, to restrain the defendants from collecting certain taxes assessed against him. The district court rendered a decree against him, and the Supreme Court of the State affirmed it. See 9 Kan., 344.

The case is stated by the court.

Messrs. R. M. Corwine, G. W. English and Quinton Corwine, for plaintiff in error:

The Act of Congress (U. S. Rev. Stat., sec. 3701) provides, that treasury notes shall be exempt from taxation.

The proceedings of the county officers constitute an attempt to evade the express language of the Act of Congress.

Can it be material what was the motive of Mitchell in getting his money converted into treasury notes?

The Statute of Kansas only authorized the taxation of such property as he had Mar. 1; and the proof shows that the money by him possessed on that day was of such a character that, by law, it could not be taxed. It is the specific property which is the subject-matter of taxation, and if there is no such property on that day, there is no right of taxation. And it is also the duty of the citizen to return only lawfully taxable property.

The question here is, not what was his motive in making the investment; but what was the character of that investment on the day of his tax return, with respect to its liability or non-liability to pay taxes to the State?

His right to make the investment cannot be questioned.

Having once made the investment, the funds invested were beyond the taxing power of the State, and it was illegal, and wholly without

warrant of law to assess that fund thus invested. It was not liable to taxation, because Congress had declared that such securities were free from taxation.

(No counsel appeared for the defendants in error).

Mr. Chief Justice Waite delivered the opinion of the court:

This case presents the following facts: Mitchell, the plaintiff, kept his account with a banking firm in Leavenworth. On the 28th February, 1870, he had a balance to his credit of \$19,350, and subject to his check in current funds. He that day gave his check for this balance, payable to himself in United States notes. These notes were paid to him. He immediately inclosed them in a sealed package, and placed them for safe-keeping in the vault of the bank. On the 3d March he withdrew his package, and deposited the notes to his credit. This was done for the sole purpose of escaping taxation upon his money on deposit.

Personal property in Kansas, which includes money on deposit, is listed for taxation, as of March 1 in each year. Mitchell did not list any money on deposit. The taxing officers, in due time, on discovery of the facts, added \$9,000 to his assessment on account of his money in bank. He asked the proper authorities to strike off this added assessment. This was refused. A tax was thereupon in due form levied, and its collection threatened.

He then filed his bill in equity against the defendants, who are the proper authorities, to restrain the collection of this tax, alleging for cause, in substance, that as his bank balance had been converted into United States notes, and was held in that form on the day his property was to be listed, he could not be taxed on that account. The Supreme Court of Kansas, on appeal, dismissed the bill, for the reason, as appears by the opinion—which in this case is sent here as part of the record—that "A court of justice, sitting as a court of equity, will not lend its aid for the accomplishment of any such purpose."

We think the decision in this case was correct. United States notes are exempt from taxation by or under state or municipal authority; but a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a court of law.

The decree is affirmed.

Cited—19 Blatchf., 182; 50 Ind., 464.

JOHN MINER, *Appt.*,

v.

THE BARK SUNNYSIDE, THOMAS PITTS, Exr., H. NORTON STRONG, Deceased, Claimant.

(See S. C., "The Sunnyside," 1 Otto, 206-208.)

Rules of navigation—collision—damages—navigator's duties—sailing rules.

1. Errors committed by one of two vessels approaching each other from opposite directions so

not excuse the other from adopting every proper precaution required, by the special circumstances of the case, to prevent a collision.

2. If both vessels are in fault, the damages must be equally apportioned between the offending vessels.

3. Navigators have other duties to perform to prevent collision, besides displaying signal-lights; and if they neglect to perform such other duties and a collision ensues in consequence of that neglect, they will not be held blameless because they displayed the signal-lights required by law.

4. When a steamer is approaching so as to involve risk of collision, a sailing vessel should keep her course, unless the danger is so imminent as to make a change of course necessary to avoid a collision.

[No. 79.]

Argued Dec. 8, 1875. Decided Jan. 10, 1876.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The case is stated by the court.

Messrs. W. A. Moore, Ashley Pond and H. B. Brown, for appellant.

Messrs. F. H. Canfield and D. B. Duffield, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Marine collisions are every year becoming more and more frequent; and experience shows that a large proportion of the disasters result from the neglect of those in charge of the vessels to comply with the rules of navigation.

Litigations often arise in which the libelants or respondents, or both, allege that nothing more could have been done at the time of the collision, by the party making the allegation, to prevent the disaster; and the proofs sometimes show that the allegations in that regard, of both parties, are true, even when it is apparent to a careful observer that both parties are in fault for having placed their respective vessels in a situation where nothing could be done to prevent them from coming together.

Disasters of the kind are doubtless sometimes the result of inevitable accident; but they much more frequently arise from the want of seasonable precaution on the part of those intrusted with the navigation of the vessels, even when the proofs show to a demonstration that nothing more could have been done at the moment of the collision by either party to have prevented the cause of the litigation. *The Virgil*, 2 W. Rob., 205.

Precautions not seasonable are of little or no value, nor do such efforts constitute a compliance with the usages of the sea or the statutory rules of navigation. Such precautions must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defense to say that nothing more could be done to avoid the collision, nor that the necessity for precautionary measures was not perceived until it was too late to render them availing. *The New York v. Rea*, 18 How., 225 [50 U. S., XV., 861].

Inability to avoid a collision usually exists at the time the collision occurs; but it is seldom a

matter of much difficulty to trace the cause of the disaster to some antecedent omission of duty on the part of one or the other or both of the colliding vessels. *Wakefield v. The Governor*, 1 Cliff., 97.

Suppose it be true that a steamer, after she has approached within a certain distance of a sail-vessel, is not then able to turn either to the right or to the left so as to avoid a collision; still the proof of that fact without more will not constitute a good defense, if it appears that the fault consisted in placing herself in that situation.

Steamers approaching sail-vessels, if the two are proceeding in such directions as to involve risk of collision, must keep out of the way of the sail-ship; and, in order to perform that duty, the steamer may go either to the right or to the left; but, if the steamer neglects to change her helm until the vessels are so near that the collision cannot be avoided, it is no defense to say that nothing could be done at the moment to avert the disaster, as it would be clear in such a case that the collision might have been prevented if the helm of the steamer had seasonably been put to port or to the starboard.

Rules of navigation are adopted to save life and property; and they are required to be observed, and are enforced to accomplish the same beneficent end, and not to promote collisions. Consequently, they have exceptions; and no party ought ever to be permitted to defend or excuse a plain error by invoking a general rule of navigation, when it is clear that the case falls within an admitted exception.

If two sailing ships are meeting nearly end on, so as to involve risk of collision, the statutory rule is that the helms of both shall be put to port, so that each may pass on the port side of the other; but if the lines of approach are parallel, and the approaching vessels are each to the starboard of the other, the effect of porting the helms of the vessels would be to render a collision more probable. Where one of two vessels is required to keep out of the way, the other is required, as a correlative duty, to keep her course; but the Act of Congress, following the usages of navigation, provides that that rule shall be subject to certain reasonable and necessary qualifications. Special circumstances may exist in particular cases, rendering a departure from the rule necessary in order to avoid immediate danger; and the Act of Congress, among other things, expressly provides that nothing in the statutory rules shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. 18 Stat. at L., 61.

Proceedings *in rem* were instituted by the owner of the steam tug William Goodnow, in the district court, against the bark Sunnyside, in a cause of collision civil and maritime, in which the libellant claimed damages for injuries received by the steam tug in a collision that took place in Lake Huron on the 14th of June, 1869, between the steam tug and the bark, about fifteen minutes past three o'clock in the morning, by which the steam tug was sunk in the lake. Though sunk in the lake, yet she was subsequently raised and towed to Detroit, and was there repaired; the expense of repairing her, including the cost of raising her, amounting to

NOTE.—Collision; measure of damages for. See note to *Smith v. Condry*, 43 U. S. (1 How.), 28.

Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 51 U. S. (10 How.), 557.

Rules for avoiding collision; steamer meeting steamer. See note to *Williamson v. Barrett*, 54 U. S. (13 How.), 331.

See 1 Otto.

\$9,500. Damages are also claimed for demurrage in the sum of \$8,600, amounting in the whole to the sum of \$18,100.

Service was made, and the owner of the bark appeared as claimant, and made answer to the libel, and filed a cross libel, charging that the collision was occasioned solely by the negligence, unskillfulness and carelessness of the persons navigating the steam tug, and claiming damages for injuries received by the bark in the collision. Witnesses were examined on both sides; and, the parties having been fully heard, the district court entered a decree that the bark and the tug were equally in fault in bringing about the collision, and that the loss and damage accruing to the two vessels be apportioned between them in equal moieties, and referred the cause to a commissioner to assess and report the amount.

Suffice it to say, that the report of the commissioner, made in pursuance of the decretal order, gave the sum of \$7,315.51 to the owner of the steam tug, the libellant in the principal case.

Exceptions were filed by the respondent, some of which were sustained and others were overruled; and the record shows that the district court entered a final decree for the libellant in that suit of \$4,724.09, together with costs of suit. Whereupon the respondent in the principal suit, and libellant in the cross libel, appealed to the circuit court for that district.

Sufficient appears to warrant the conclusion that the evidence was the same in the circuit court as in the district court. Both parties were again heard in the circuit court; and the circuit court reversed the decree of the district court, and entered a decree for the libellant in the cross libel, and dismissed the libel in the suit instituted by the owner of the steam tug. Instead of holding that both vessels were in fault, the circuit court decided that the steam tug was wholly in fault; and the libellant in the principal suit appealed to this court, and now seeks to reverse that decree.

Much difference of opinion respecting what took place just before and at the time of the collision cannot exist, as most of the material facts are either conceded, or so fully proved, that much discussion of the evidence, save in a single particular, is rendered unnecessary. Avoiding immaterial details, the facts may be stated as follows:

That the steam tug lay in the lake, three miles from the shore, near the head of St. Clair River, with her white and colored lights burning, waiting for a tow, in conformity to a well known usage with such steamers plying in those waters. By the evidence it also appears that the steam tug was heading east by north half north; that the night was clear, and that the morning had so far dawned that such a vessel could be seen, even without lights, from one and a half to two miles by another vessel approaching from a northeasterly direction; that the bark was coming up the lake, on her way from Erie to Chicago, laden with coal, under a whole sail breeze, and was heading north half west. Beyond all doubt, she had plenty of sea-room on each side; and the evidence shows that she had all her sails set, including her studding sails, and that she was moving through the water at a speed of nine miles an hour.

Preceding the collision, the steam tug had for several hours been lying with her machinery stopped, waiting for a tow, which those in charge of her expected to find, as vessels passed up or down the lake on that route. Steam tugs waiting there for such employment remain as nearly stationary as possible, without coming to anchor. Of course, the vessels are liable to drift before the wind; and the evidence in this case shows that the wind was southwest, and that the steam tug drifted at the rate of a mile or a mile and a half per hour, though all of her machinery was stopped, and she had her "rudder lashed to the starboard," and her signal-lights burning, as required by law, when in motion.

Both courts below came to the conclusion that the steam tug did not have a competent lookout; and the court here is of the same opinion, even if the testimony of the mate is entitled to full credit. All agree that it was the mate's watch. He admits that his attention was called to the lights of the bark when she was quite distant; and he states to the effect, that, not being able to see very well where he was standing, he started forward; that, when he got about midships, he saw the jib-boom of the bark coming over the steam tug just forward of the pilot house, which was just before the collision occurred; and it appears that the steam tug sunk in fifteen or twenty minutes after the two vessels came together.

Throughout the period, from the time the attention of the mate was called to the lights of the bark to the time of the collision, it does not appear that either he or the lookout made any effort to ascertain the situation or course of the approaching vessel, except that the mate started to go forward just before the steam tug was struck by the bark. When his attention was called to the lights of the approaching vessel, both he and the lookout were aft; and it does not appear that the lookout even started to go forward after he had notified the mate that lights were approaching, nor that he did anything else in the line of his duty, nor was he examined as a witness in the case.

Damages for the entire injuries received by the bark are claimed by her owners, not only on the ground that she was without fault, but on the further ground that the steam tug, having been without a competent lookout, is liable in the admiralty court for all the loss or damage which the bark sustained.

Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision; as the Act of Congress provides that, in obeying and construing the prescribed rules of navigation, due regard must be had to the special circumstances rendering a departure from them necessary in order to avoid immediate danger. 18 Stat. at L., 61; *The Maria Martin*, 12 Wall., 47 [79 U. S., XX., 255]; *The Lucilla*, 15 Wall., 679 [82 U. S., XXI., 247].

Steamboats and propellers navigating the northern and western lakes during the night were required to show signal-lights of a prescribed character fifteen years before the passage of the Act applying rules and regulations, in that regard to the navy and the general marine of the United States. 9 Stat. at L., 330.

Subsequent to the passage of that Act, a disastrous collision occurred on Lake Erie between the steamer Atlantic and the propeller Ogdensburg, each charging the other with fault; and it appeared on appeal here that the propeller did not show the prescribed signal-lights, in consequence of which it was insisted by the owners of the steamer that the propeller was liable for all the loss and damage sustained by the steamer. Attempt was made to maintain that proposition, in view of the language of the Act of Congress requiring such steam-vessels to show signal lights; but this court held otherwise, and remarked to the effect following:

Such is not the language of the section; and we think the construction contended for would be both unwarranted and unreasonable. Owners of the vessels named in that section are made liable for the consequences resulting from their own acts, or from the acts of those intrusted with the control and management of their own vessels, and not for any damage resulting from the misconduct, incompetency or negligence of the master or owners of the other vessel. They are made liable for their own neglect, and not for the neglect of the other party.

Failure to comply with the statutory regulations, in case a collision ensues, is declared to be a fault, and the offending party is made responsible for all the loss and damage resulting from the neglect; but it is not declared by that section, or by any other Rule of admiralty law, that the neglect to show signal-lights on the part of one vessel discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision.

Lights of the kind are required by law; and the absence of them, in cases falling within the prescribed regulations, renders the vessel liable for her neglect; but it does not confer any right upon the other vessel to disregard or violate any rule of navigation, or to neglect any reasonable and practicable precaution to avoid the impending danger which the circumstances afford the means and opportunity to adopt. Steamers displaying proper signal-lights are, in that respect, without fault; but they have other duties to perform to prevent collisions besides complying with that requirement, and their obligations to perform such other duties remain unaffected by anything contained in that Act of Congress.

Vessels of the kind are required to show signal-lights, in order that each may be seen by the other in time to adopt reasonable and necessary precautions to prevent the loss of life and property by collisions; but if one has such lights, and the other has not, yet if the one having such lights actually sees the other vessel as she approaches in ample season to avoid the collision, and neglects to take any proper precaution to prevent it, and it ensues, it cannot be said in such a case that all the loss and damage resulted from the neglect of the vessel without signal-lights, as the collision might have been prevented and, but for the negligence and omission of duty on the part of those in charge of the other vessel, would never have occurred.

Enforced by those reasons, this court decided in that case that the neglect of the propeller to show signal-lights did not vary the obligations of the steamer to observe the rules of navigation, and to adopt all such reasonable and nec-

essary precautions to prevent the collision as the circumstances in which she was placed gave her the opportunity to employ. *Chamberlain v. Ward*, 21 How., 567 [62 U. S., XVI., 218].

Apply the foregoing rules of decision to the case before the court, and it is clear that the important question remains to be considered, whether the bark was or was not also in fault; for, if she was, the rule is well settled by the repeated decisions of this court that the damages should be divided between the offending vessels. *The Catharine v. Dickinson*, 17 How., 170 [58 U. S., XV., 233]; *The Morning Light*, 2 Wall., 557 [64 U. S., XVII., 863]; *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, 24 How., 318 [65 U. S., XVI., 701].

Where the collision occurs exclusively from natural causes, and without any fault on the part of the owner of either vessel or those intrusted with their control and management, the maritime rule, as defined by the Federal Courts, is, that the loss shall rest where it falls, on the principle that no one is responsible for such a disaster when produced by causes over which human skill and prudence can exercise no control.

Admiralty courts everywhere have now adopted that rule; but it cannot be applied where either or both of the vessels are in fault; as, where the vessel of the respondent is alone in fault, the libellant is entitled to a decree for his damages. The converse of the proposition is equally true, that, if the vessel of the libellant is alone in fault, the proof of that fact is a sufficient defense to the libel; but if both vessels are in fault, then the damages must be equally apportioned between the offending vessels. *The Continental*, 14 Wall., 855 [81 U. S., XX., 802].

Reciprocal faults were charged in that case; but the circuit and district courts decided that the propeller was wholly in fault, because she did not show proper signal-lights; the theory being, that the failure of the propeller to display proper signal-lights misled the steamer as to the true character of the approaching vessel. On the other hand, the charge against the steamer was, that she put her helm to starboard instead of porting, as required by the rules of navigation.

Satisfactory proof having been given to make good the charge against the steamer, the court here reversed the decree of the circuit court, and gave directions that the damages should be divided.

Absence of proper signal-lights in such a case, say the court, renders the owners liable for the consequences resulting from the omission; but it does not confer any right upon the other vessel to disregard or violate any rule of navigation, or to neglect any reasonable or practicable precaution to avoid a collision, which the circumstances afford the means and opportunity to adopt. Navigators often have other duties to perform to prevent collisions besides displaying signal-lights; and if they neglect to perform such other duties, and a collision ensues in consequence of that neglect, they will not be held blameless because they displayed the signal-lights required by law. *The Gray Eagle*, 9 Wall., 511 [76 U. S., XIX., 743].

Evidence of the most satisfactory character is exhibited in the record that the lights of the steam tug were seen by the lookout of the bark

and by the officer of the deck when the two vessels were nearly or quite two miles apart. Beyond controversy, it was the lookout of the bark who first discovered the lights; but it is beyond dispute that he immediately reported to the mate, as the officer of the deck, that there was a light ahead, a little on the port bow; which is fully confirmed by the testimony of the mate, who states that, when the lookout sang out that there was a light ahead, he ran forward to the lookout, who was stationed on the top-gallant forecastle, in the forward part of the vessel.

Taking his account of what transpired as true, all he did was to look briefly at the light, and to remark to the lookout that he supposed it was a steamer, adding that he guessed she would take care of herself, and returned aft, apparently unconcerned, to look after other lights. He admits that he gave no order to the wheelman, and that he heard nothing further of the steam tug until the lookout sang out that the light was close under the bow of the bark.

Without stopping to state what the mate did or attempted to do in that emergency, it may be well in the first place to ascertain what, if anything, the lookout did to ward off the impending peril, after the officer of the deck returned aft when first summoned and shown that there were lights ahead. Lookouts are expected to obey the officer of the deck; and all experience shows that seamen acting in that capacity are more or less vigilant as the orders or conduct of the officer in charge of the deck seem to require. Indifference in respect to an approaching light, such as that manifested by the mate, was not calculated to induce much vigilance on the part of the lookout; and his own testimony shows that his services in that regard, after the mate left the forecastle and returned aft, were of no value whatever. What he says is, in effect, that the steam tug showed her green and bright lights, that she appeared to be heading to the eastward, but that he could not tell whether she was in motion or not; and he admits, that, after the mate said he guessed she would take care of herself, he paid no attention to her until he saw her close under the jib-boom of the bark, when the steam tug appeared to be drifting.

Hurry, confusion and alarm followed, as is obvious from the testimony of the mate. When the lookout gave the second warning, the mate testifies that he shouted to the man at the wheel, "Hard up!" that he shouted as he ran from where he was standing, fifteen feet abaft the mainmast, a distance of eighty or ninety feet to the top-gallant forecastle, where the lookout was; but he admits that the order was too late to be of any avail; that the vessel had then no time to swing off; that the collision was inevitable; and that the bark struck the steam tug on her starboard side, forward of the pilot house. Haste then was useless; and there can be no doubt that what the mate finally says is true, that there was nothing then that could have been done on their part to avoid the collision.

Negligence more manifest, culpable or indefensible, in view of the circumstances, is seldom exhibited in controversies of this character; and the only excuse offered for it is, that the 18th Sailing Rule provides that, where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlook-

ing the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification, that, in obeying and construing the rule, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immediate danger.

Years before the Act of Congress referred to was passed, this court promulgated the doctrine, that rules of navigation are adopted to prevent collision, and to save life and property at sea, and not to promote such disasters; and decided that the neglect of one of two approaching vessels to show the signal-lights required by law did not vary the obligations of the other to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision as the circumstances in which she was placed gave her the opportunity to employ. *Steamship v. Rumball*, 21 How., 388 [62 U. S., XVI., 148]; *Chamberlain v. Ward* 21 How., 568 [62 U. S., XVI., 218].

Reasonable doubt cannot, we think, be entertained, that Congress, in enacting the Sailing Rules intended to promote the same objects by substantially the same requirements; for which there is abundant confirmation in article 20 of the Sailing Rules, which is as follows: nothing in these rules shall exonerate any ship, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or the special circumstances of the case. 13 Stat. at L., 61.

Leave was granted to the libellant in the district court to amend the libel; and he amended the fourth article of the same to the effect following: that the steam tug was lying motionless upon the water, out of the track of vessels going up and down the lake; that the bark had no competent lookout properly stationed on the vessel; that the collision was occasioned by the neglect of the officers and crew of the bark to see the steam tug, or to discover that she was not in motion in season to take any steps to prevent the collision.

Vigilance as well as experience is required of a lookout; and, if he is inattentive to his duty, it is no sufficient excuse to say that he was competent to perform the required service. No doubt the bark had a lookout; and the evidence tends to prove that he was competent; but his own testimony shows conclusively that he did not properly perform his duty after the mate came forward and returned aft. He admits that he could not tell whether, at that time, the steam tug was stationary or in motion; and he must have known that the mate left the forecastle and went aft as ignorant upon the subject as he himself was.

Suppose that was so, and there is no apparent reason to doubt it, then it was his plain duty, the moment he ascertained that the lights ahead were stationary, to have reported that fact to the mate as the officer of the deck. Steamers in motion, the mate might think, would take care of themselves; but the lookout could not know what the mate would think if he should be informed that the lights were stationary.

Lookouts, as he supposes, are not required to

report the same light a second time, though he admits it might become the duty of a lookout to do so in case the circumstances were materially changed. He did not make a second report in season to be of any avail, except, perhaps, to arouse the mate to a consciousness of his prior neglect in not making some effort to ascertain whether the lights ahead were stationary or in motion.

Whether a second report before the collision became inevitable would have dispelled the feeling of security manifested by the mate cannot be known; but it is clear that no such second report was made in season to enable the mate to adopt any effectual precaution whatever; and the only excuse the lookout offers is what the mate remarked when the first report was made, that it was a steamer, and that he guessed she would take care of herself. Beyond all question, the steam tug was left to take care of herself until the moment the collision occurred, when neither the shouting nor the hurried orders of the mate could prevent the disaster.

Culpable misconception as to his duty on the part of the mate, and inattention and carelessness on the part of the lookout, induced, perhaps, by the remarks of the mate that it was a steamer, and that she would take care of herself, were the primary causes of the neglect and omission of duty which led to the collision. Substantially the same view of the facts was taken by the district judge; and he decided that the rule that, when a sailing vessel and a steamship are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship, and that the sailing ship shall keep her course, do not excuse the sailing ship from the observance of ordinary care in her navigation, nor from the use of such means as may be in her power to avoid a collision in case of immediate danger, even though that danger may have been made imminent by the non-observance of duty on the part of the steamship.

Authorities were cited by the district judge in support of his proposition; and he also adverted very fully to the evidence showing what took place between the mate and the lookout, and then remarked that the mate then left the fore-castle and went to another part of the vessel to watch some lights at the leeward of the bark, and paid no further attention to the lights of the steam-tug; and proceeds to say—what is fully supported by the testimony—that from that time the lights of the steam-tug were not reported by the lookout, nor was any watch kept or notice whatever taken of them on board the bark until the lookout saw and reported that the steam-tug was right under the bows of the bark, and a collision was inevitable.

Throughout, it should be observed, that the lights of the steam tug were seen by the lookout and mate of the bark when the two vessels were from a mile and a half to two miles apart, and that the speed of the bark did not exceed nine miles an hour.

Viewed in the light of the circumstances, it is obvious that the mate and lookout of the bark had abundant time to have determined whether the steam tug was in motion, or only drifting. If they had used common care and ordinary vigilance in that regard, as they were bound

See 1 Otto.

to do; nor would there have been any difficulty in avoiding the collision, if proper precaution had been seasonably adopted for that purpose; and, inasmuch as no such precaution was taken by those in charge of the deck of the bark, it follows that she also is in fault, and must answer for her fair proportion of the loss occasioned by the collision, as the fault of the steam-tug does not excuse the fault of the bark, if the latter was in any substantial degree a contributory cause of the collision. *The Ariadne*, 18 Wall., 479 [80 U. S., XX., 548].

Due appeal was taken to the circuit court; and the circuit judge reversed the decree of the district court and determined that the bark was without fault; deciding, among other things, that the officer in charge of the deck of the bark, having once observed the light ahead, had full authority to act upon the assumption that the steam tug would keep out of the way; and he also ruled, that if a light in such a case is reported to an officer in charge of a vessel required by the rule to keep her course, and, from full observation, the unambiguous, apparent condition, in reference to wind, atmosphere, course, distance and character of the vessel, all indicate absolute safety, if the rule of the road is complied with, he may leave the future watching of such a light to an experienced lookout, and that it will not be a fault if he does not himself remain with the latter and participate in his observation.

Even suppose that can be admitted, it is difficult to see how the admission can in any way benefit the bark, as the bark is responsible for the negligence of her lookout as well as the officer in charge of her deck; and the circuit judge states that the lookout testified that he did perceive that the steam tug was at rest, and he adds that the fact is too apparent to admit of discussion.

All admit that steamships engaged in navigation are to keep out of the way of sailing ships when the two are proceeding in such directions as to involve risk of collision; and that the sailing ship under such conditions is to keep her course subject to the qualifications contained in article 19 of the Sailing Rules, and subject to the obligation applicable to all ships under way, which is ordained in the twentieth article of the same rules, that nothing contained in those rules shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

Doubts may well be entertained whether the bark did keep her course with such exactness as is supposed by her owners. Both parties assume that the steam-tug was drifting eastward from one and a half to two miles an hour, and that the bark, when the lights of the steam-tug were first seen by the lookout and mate, was heading north half west. None of the witnesses pretend that the speed of the bark exceeded nine miles an hour; and the proof is full to the point that the lights of the steam tug, when first seen from the bark, bore less than a half point over the port bow of the bark, and that she struck the steam tug square on her starboard side, forward of the pilot-house.

Tested by these conceded facts, it is almost past belief that the bark maintained her course

of north half west from the time the lights of the steam-tug were first seen to the time of the collision; but we prefer to rest the decision upon the ground that it was the duty of the bark, in view of the special circumstances, to have put up her helm and have gone to the right, or to have put it down and suffered the steam tug to drift past in safety.

Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters. In general, says Mr. Parsons, established rules and known usages should be carefully followed; for every vessel has a right to expect that every other vessel will regard them, but not where they will, from peculiar circumstances, certainly cause danger; as if a vessel, near a rock or shore, must strike it by putting her helm to port, which the general rule might require: and he adds, that "No vessel is justified; by pertinacious adherence to a rule, for getting into collision with a ship which she might have avoided;" which is the exact case before the court. 1 Pars. Ship. and Ad., 580.

Decided cases to support that proposition are very numerous, besides those to which reference has already been made, as will be seen by referring to the same page of the treatise just cited.

It must be remembered, says Mr. Justice Curtis, that the general rule is for a sailing vessel meeting a steamer to keep her course, while the steamer takes the necessary measures to avoid a collision; and though this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule; for the court must clearly see, not only that a deviation from the rule would have prevented the collision, but that the officer in charge of the sailing ship was guilty of negligence or a culpable want of seamanship in not perceiving the necessity for a departure from the rule, and for acting accordingly. *Crockett v. Newton*, 18 How., 583 [59 U. S., XV., 493].

Sailing vessels on the larboard tack and close-hauled are, in general, required to keep their course; but Dr. Lushington held that such a vessel is not justified in pertinaciously keeping her course, even though the vessel she meets is on the starboard tack, and with the wind free. Where practicable, said that learned judge, such a vessel is bound to take the necessary precautions for avoiding the collision, although the other vessel is acting wrongfully in not giving way in time; and in that case he held that both vessels were in fault. *The Commerce*, 8 W. Rob., 287; *Handyside v. Wilson*, 8 Car. & P., 580.

Reasonable care and vigilance would have enabled the mate as well as the lookout to have perceived that the steam tug was not in motion, and they cannot be excused for their negligence merely by the fact that the steam tug showed the lights required to be displayed by a steamer under headway; nor are the owners of the same estopped from showing what the special circumstances were because she showed such

lights. Navigators know that the rule requiring steamers to keep out of the way of sailing ships, and which require sailing ships to keep their course, apply to vessels in motion, and not to a vessel at anchor, nor to one which is lying fastened to the wharf; nor do they apply to a vessel going about in stays, if it appears that she was properly put in stays, for the reason that such a vessel for the time being is almost as helpless as a vessel at anchor. *The Sea Nymph*, Lush., 28.

Due care and caution should be used by steam tugs lying with their helms lashed waiting for employment; but approaching vessels have no right to regard them as mere obstructions to commerce, nor as fit objects to be run down with impunity. Persons navigating the seas or lakes have no right to cast themselves upon such vessels, as upon an obstruction which has been made by the fault of another, and then avail themselves of it for any defensive purpose, unless they show that they, themselves, used common and ordinary caution to be in the right. *Butterfield v. Forrester*, 11 East, 60; *Farnum v. Concord*, 2 N. H., 393.

Admiralty courts everywhere hold that a sailing vessel should keep her course when a steamer is approaching, so as to involve risk of collision, unless the case is such as clearly to bring it within the qualifications and exceptional special circumstances contained and described in the nineteenth and twentieth articles of the Sailing Rules; but where no dangers of navigation prevail, nor any exceptional or special circumstances are shown, the general rule must be applied, as appears by all the standard authorities. *The Warrior*, L. R. 3 Adm. & Eccl., 555.

Decree of the Circuit Court reversed, and the cause remanded, with directions to enter a decree affirming the decree of the District Court.

Cited—91 U. S., 697; 93 U. S., 312, 406.

MARIE A. N. POLLARD, *Plff. in Err.*,

v.

JACOB LYON.

(See S. C., 1 Otto, 225-238.)

Slander—actionable words—special damages.

1. Words charging an unmarried woman with fornication are not, in themselves, actionable.
2. In such case the special damage must be alleged in the declaration and proved, and it is not sufficient to allege that the plaintiff has been damaged and injured in her name and fame.

[No. 93.]

Argued Dec. 17, 1876. Decided Jan. 10, 1876.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

NOTE.—*Slander; imputing unchastity to a female.* At common law, words imputing to a female immoral or unchaste conduct are only actionable when special damage ensues. They are not, when published orally, in the absence of any statutory provision, actionable per se. *Lucas v. Nicholson*, 7 Jones, 82; *Roberts v. Roberts*, 5 B. & S., 384; S. C., 23 L. J., Q. B., 249; 10 Jur., N. S., 1037; 12 W. R., 303; 30 L. T., N. S., 602; *Robertson v. Powell*, 2 Selw. N. P., 511; *Wilby v. Elston*, 8 C. B., 142; S. C., 7 D. & L., 223; 23 Jur., 706; 18 L. J. C. P., 320; 1 Starkie on Slander, 28; *Ranger v. Goodrich*, 17 Wis., 78; *Eliot v. Ambler*,

91 U. S.

Mrs. Joseph H. Bradley and A. G. Riddle, for plaintiff in error:

It is conceded, and it is the law, that if the words are actionable, special damages need not be alleged.

The Act of the Assembly of Maryland, 1715, ch. 27, secs. 2, 3, is in force in this District.

The words charged import the offense of adultery, accordingly as the jury may find that the plaintiff was married or single.

The Act of 1785, ch. 47, sec. 4, repeals so much of the Act of 1715 as provides the mode of procedure, but the offense of adultery still remains criminal, and is punished as such.

The distinction taken by the defendant is, that although the words spoken may import that the plaintiff has committed either fornication or adultery, they are not actionable *per se*, because they are here punishable only by a pecuniary fine.

This distinction is seeming and not real. It proceeds upon a mistaken view of the principle on which the plaintiff's right of action depends, and is at variance with the weight of ancient and modern authority.

Com. Dig., 278, 4th ed., n.; *Moore v. Meagher*, 1 Taunt., 44; 1 Com., 15th ed., Action upon the case for defamation, D, 9; *Chaddock v. Briggs*, 18 Mass., 252; *Miller v. Parish*, 8 Pick., 384; 7 Conn., 707; *Brooker v. Coffin*, 5 Johns., 188.

The case of *Brooker v. Coffin* appears to have reached the true principle, and thereby to reconcile the conflict in definitions in the earlier English cases. According to the criterion there established, the circumstance of an offense being penal, and of infamy attaching either to the offense or the punishment, will render an imputation of that offense slander.

The criterion of the first part of the rule is, that the imputed offense be indictable, or otherwise punishable, and should involve moral turpitude, and it is approved and applied in: *Wid-*

rig v. Oyer, 13 Johns., 124; *Martin v. Stillwell*, 13 Johns., 275; *Case v. Buckley*, 15 Wend., 827; *Bisell v. Cornell*, 24 Wend., 854; *Young v. Miller*, 8 Hill, N. Y., 21.

It is not necessary that legal infamy attach. So far as that element is concerned, it is sufficient if the offense is infamous or disgraceful in a general or moral sense.

See *Crawford v. Wilson*, 4 Barb., 505, 511; *Van Ness v. Hamilton*, 19 Johns., 849; *Young v. Miller*, 8 Hill, N. Y., 21; *Malone v. Stewart*, 15 Ohio, 319.

In Alabama the rule is applied where the offense is punishable by fine, and was morally base and wicked. It obtained also in N. J., Del., Mich., Ga., Pa., S. C., Mass., Ia. and Vt. See 1 Am. L. Cases, 5th ed., p. 95; Mr. Townshend, Slander, p. 204, secs. 152, 153, 153 a, 154-158; 1 Hill. Torts, 264, sec. 29; Heard, Libel, sec. 24; *Van Ankin v. Westfall*, 14 Johns., 283; *Shipp v. McCraw*, 3 Murphy, 463.

But words imputing want of chastity in a female, according to the weight of authority, are actionable without proof of special damages. *Truman v. Taylor*, 4 Ia., 424; *Pledyer v. Hathcock*, 1 Kelly, 550; *Gavell v. Berked*, 1 Mod., 32; *Vanderlip v. Roe*, 23 Pa., 83; *Miller v. Parish*, 8 Pick., 384; *Kenney v. McLaughlin*, 5 Gray, 5; *Abshire v. Oline*, 3 Ind., 115; or any defect which degrades her in society. *Malone v. Stewart*, 15 Ohio, 319; *Symonds v. Carter*, 32 N. H., 458; *Williams v. Holdredge*, 22 Barb., 396; and the numerous cases cited in Am. L. Cas., Hilliard, Heard and Townshend, already referred to.

Mr. Walter S. Cox, for defendant in error:

The imputation of incontinence to a female, either generally or particularly, does not charge her with a criminal offense, punishable in the secular courts and, therefore, is not actionable. The English and American authorities are full on this head.

See, 1 Stark. Sland., 198, *et seq.*; 1 Am. L.

ry, 2 Bibb, 473; *Rogers v. Lacey*, 23 Ind., 507; *Pettibone v. Simpson*, 66 Barb., 493; *Byron v. Elmes*, 2 Salk., 608; *W. v. L.*, 2 Nev. & M., 204; *Berry v. Carter*, 4 Stew. & Port., 387; *Linney v. Malton*, 13 Tex., 449; *McQueen v. Fulghan*, 27 Tex., 463; *Boyd v. Brent*, 3 Brev., 241; *Underhill v. Welton*, 32 Vt. 40; *Brooker v. Coffin*, 5 Johns., 188; *Falkner v. Cooper*, Carth., 55; *Colabyn v. Viner*, W. Jones, 356; *Griffin v. Moore*, 48 Md., 436; *Lucas v. Nichols*, 7 Jones' Law, 32.

The loss of marriage, of hospitality of friends, of means of support or of any substantial benefit, is sufficient special damage to sustain the action, whether the plaintiff be a man or a woman. *Davis v. Gardiner*, 4 Co., 16; *Mathews v. Crass*, Cro. Jac., 323; *Keeton v. Pomfreicht*, Cro. Eliz., 639; *Moore v. Meagher*, 1 Taunt., 39; *Davies v. Solomon*, 41 L. J., Q. B., 10; *Underhill v. Welton*, 32 Vt., 140; *Malone v. Stewart*, 15 Ohio, 319; *Linck v. Kelly*, 25 Ind., 278; *Cleveland v. Detweiler*, 18 Iowa, 299; *Spencer v. McMaster*, 16 Ill., 405.

Refusal of entertainment by a person accustomed to receive plaintiff, is sufficient damage to sustain the action if the refusal was the direct result of the defamatory words. *Pettibone v. Simpson*, 66 Barb., 492.

Illness of a married woman from over-excitement produced by the slander and her consequent inability to attend to domestic affairs, are not the kind of damage which will sustain the action. *Allsop v. Allsop*, 5 H. & N., 534.

It has been held otherwise of an unmarried female dependent on her labor. *Fuller v. Fenner*, 16 Barb., 221.

Words charging a woman with intercourse with a beast are actionable *per se*. *Haynes v. Ritchey*, 30 Iowa, 75; S. C., 6 Am. Rep., 642.

Words charging a female with self-pollution are not actionable *per se*. Plaintiff's father, on whom

See 1 OTTO.

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she was dependent, withholding a dress and course of music lessons in consequence of the charge, when he testified that he did not believe it, is not such damages as will sustain an action. *Anon.*, 60 N. Y., 232; S. C., 19 Am. Rep., 174.

In many States, however, it is held that words imputing unchastity to a woman are actionable *per se*. *Terry v. Bright*, 4 Md., 430; *Frisbie v. Fowler*, 2 Conn., 707; *Sidgreaves v. Myatt*, 22 Ala., 617; *Watts v. Greenlee*, 2 Dev., 115; *McGee v. Wilson*, Litt. Sel. Cas., 187; *Smalley v. Anderson*, 2 T. B. Mon., 56; *McBrayer v. Hill*, 4 Ired., 136; *Snow v. Witcher*, 9 Ired., 346; *Malone v. Stewart*, 15 Ohio, 319; *Wilson v. Robbins*, Wright, 40; *Wilson v. Runyon*, Wright, 651; *Sexton v. Todd*, Wright, 317; *Shields v. Cunningham*, 1 Blackf., 86; *Worth v. Butler*, 7 Blackf., 251; *Rodeburg v. Hollingsworth*, 6 Ind., 639; *Rodgers v. Lacey*, 23 Ind., 507; *Linck v. Kelley*, 25 Ind., 278; *Blickensraff v. Perrin*, 27 Ind., 527; *Waugh v. Waugh*, 47 Ind., 590; *Spencer v. McMaster*, 16 Ill., 405; *Cox v. Bunker*, Morris, 209; *Smith v. Silence*, 4 Iowa, 321; *Dalley v. Reynolds*, 4 Greene, 354; *Wilson v. Beighler*, 4 Iowa, 427; *Truman v. Taylor*, 4 Iowa, 424; *Beardsley v. Bridgman*, 17 Iowa, 290; *Cleveland v. Detweiler*, 18 Iowa, 299.

It has also been held actionable to say of a woman that she was a "loose woman," or to charge open and gross lewdness, or to say of a married woman that "she slept with one not her husband," or to charge an unmarried woman with being pregnant, and in other instances, similar charges have been held slanderous. *Adcock v. Marsh*, 8 Ired. Law, 360; *Underhill v. Welton*, 32 Vt., 49; *Guard v. Risk*, 11 Ind., 156; *Miles v. Van Horn*, 17 Ind., 245; *Smith v. Minor*, Cox, 16; *Beardsley v. Bridgman*, 17 Iowa, 290; *Richardson v. Roberts*, 23 Ga., 215; *Downing v. Wilson*, 36 Ala., 717; *Symonds v. Carter*, 32 N. H., 458; *Proctor v. Owens*, 18 Ind., 21.

Cas., 102 *et seq.* and cases cited; also, *Wagaman v. Byers*, 17 Md., 188; *Bradt v. Towles*, 18 Wend., 254; *Castleberry v. Kelly*, 26 Ga., 606; *Dukes v. Clark*, 2 Blackf., 20.

Mr. Justice Clifford delivered the opinion of the court:

Words both false and slanderous, it is alleged, were spoken by the defendant of the plaintiff; and she sues in an action on the case for slander to recover damages for the injury to her name and fame.

Controversies of the kind, in their legal aspect, require pretty careful examination; and, in view of that consideration, it is deemed proper to give the entire declaration exhibited in the transcript, which is as follows:

"That the defendant, on a day named, speaking of the plaintiff, falsely and maliciously said, spoke and published of the plaintiff the words following, 'I saw her in bed with Captain Denty.' That at another time, to wit: on the same day, the defendant falsely and maliciously spoke and published of the plaintiff the words following, 'I looked over the transom-light and saw Mrs. Pollard,' meaning the plaintiff, 'in bed with Captain Denty;' whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in the sum of \$10,000."

Whether the plaintiff and defendant are married or single persons does not appear; nor is it alleged that they are not husband and wife, nor in what respect the plaintiff has suffered loss beyond what may be inferred from the general averment that she had been damaged and injured in her name and fame.

Service was made, and the defendant appeared and pleaded the general issue; which being joined, the parties went to trial; and the jury, under the instructions of the court, found a verdict in favor of the plaintiff for the whole amount claimed in the declaration. None of the other proceedings in the case, at the special term, require any notice, except to say that the defendant filed a motion in arrest of judgment, on the ground that the words set forth in the declaration are not actionable, and because the declaration does not state a cause of action which entitles the plaintiff to recover; and the record shows that the court ordered that the motion be heard at general term in the first instance. Both parties appeared at the general Term, and were fully heard; and the court sustained the motion in arrest of judgment, and decided that the declaration was bad in substance. Judgment was subsequently rendered for the defendant, and the plaintiff sued out the present writ of error.

Definitions of slander will afford very little aid in disposing of any question involved in this record, or in any other, ordinarily arising in such a controversy, unless where it becomes necessary to define the difference between oral and written defamation, or to prescribe a criterion to determine, in cases where special damage is claimed, whether the pecuniary injury alleged naturally flows from the speaking of the words set forth in the declaration. Different definitions of slander are given by different commentators upon the subject; but it will be sufficient to say that oral slander, as a cause of action, may be divided into five classes,

as follows: (1) Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or (3) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

Two propositions are submitted by the plaintiff to show that the court below erred in sustaining the motion in arrest of judgment, and in deciding that the declaration is bad in substance: (1) That the words set forth in the declaration are in themselves actionable, and consequently that the plaintiff is entitled to recover, without averring or proving special damage. (2) That if the words set forth are not actionable *per se*, still the plaintiff is entitled to recover under the second paragraph of the declaration, which, as she insists, contains a sufficient allegation that the words spoken of her by the defendant were, in a pecuniary sense, injurious to her, and that they did operate to her special damage.

Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage; as if they import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged for a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.

Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff; and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offense, for their actionable quality is a question of law, and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion.

Unless the words alleged impute the offense of adultery, it can hardly be contended that they impute any criminal offense for which the party may be indicted and punished in this District; and the court is of the opinion that the words do not impute such an offense, for the reason that the declaration does not allege that either the plaintiff or the defendant was married at the time the words were spoken. Support to that view is derived from what was shown at the argument, that fornication as well as adultery was defined as an offense by the Provincial Statute of the 8d of June, 1715, by which it was enacted that persons guilty of those offenses, if convicted, should be fined

and punished as therein provided. Kilty, L., ch. xxvii., sec. 2, 3.

Beyond all doubt, offenses of the kind involve moral turpitude; but the 2d section of the Act which defined the offense of fornication was, on the 8th of March, 1785, repealed by the Legislature of the State. 2 Kilty, ch. XLVII., sec. 4.

Sufficient is remarked to show that the old law of the province defining such an offense was repealed by the law of the State years before the Territory, included within the limits of the city, was ceded by the State to the United States; and, inasmuch as the court is not referred to any later law passed by the State, defining such an offense nor to any Act of Congress to that effect passed since the cession, our conclusion is that the plaintiff fails to show that the words alleged impute any criminal offense to the plaintiff for which she can be indicted and punished.

Suppose that is so; still the plaintiff contends that the words alleged, even though they do not impute any criminal offense to the plaintiff, are, nevertheless, actionable in themselves, because the misconduct which they do impute is derogatory to her character, and highly injurious to her social standing.

Actionable words are, doubtless, such as naturally imply damage to the party; but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage. *Clement v. Chivis*, 9 Barn. & C., 174; *M'Clurg v. Ross*, 5 Binn., 219.

Unwritten words, by all or nearly all the modern authorities, even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offense, for which the party may be indicted and punished. Judges as well as commentators, in early times, experienced much difficulty in extracting any uniform definite rule from the old decisions in the courts of the parent country, to guide the inquirer in such an investigation; nor is it strange that such attempts have been attended with so little success, as it is manifest that the incongruities are quite material and, in some respects, irreconcilable. Nor are the decisions of the courts of that country, even of a later period, entirely free from that difficulty.

Examples both numerous and striking are found in the reported decisions of the period last referred to, of which only a few will be mentioned. Words which of themselves are actionable, said Lord Holt, must either endanger the party's life, or subject him to infamous punishment; that it is not enough that the party may be fined and imprisoned, for a party may be fined and imprisoned for a common trespass, and none will hold that to say one has committed a trespass will bear an action; and he added that at least the thing charged must "in itself be scandalous." *Ogden v. Turner*, 6 Mod., 104.

Viewed in any proper light, it is plain that the judge who gave the opinion in that case meant to decide that words, in order that they may be actionable in themselves, must impute to the party a criminal offense affecting the so-

cial standing of the party, for which the party may be indicted and punished.

Somewhat different phraseology is employed by the court in the next case to which reference will be made. *Onslow v. Horne*, 3 Wils., 186. In that case, De Grey, Ch. J., said the first rule to determine whether words spoken are actionable is, that the words must contain an express imputation of some crime liable to punishment, some capital offense or other infamous crime or misdemeanor, and that the charge must be precise. Either the words themselves, said Lord Kenyon, must be such as can only be understood in a criminal sense, or it must be shown by a *colloquium* in the introductory part that they have that meaning; otherwise they are not actionable. *Holt v. Scholefield*, 6 T. R., 694.

Separate opinions were given by the members of the court in that case; and Mr. Justice Lawrence said that the words must contain an express imputation of some crime liable to punishment, some capital offense or other infamous crime or misdemeanor; and he denied that the meaning of words not actionable in themselves can be extended by an *innuendo*. *James v. Rutledge*, 4 Co., 17 b.

Prior to that, Lord Mansfield and his associates held that words imputing a crime are actionable, although the words describe the crime in vulgar language, and not in technical terms; but the case does not contain an intimation that words which do not impute a crime, however expressed, can ever be made actionable by a *colloquium* or *innuendo*. *Colman v. Godwin*, 3 Doug., 90; *Woolnoth v. Meadows*, 5 East, 468.

Incongruities, at least in the forms of expression, are observable in the cases referred to, when compared with each other; and when those cases, with others not cited, came to be discussed and applied in the courts of the States, the uncertainty as to the correct rule of decision was greatly augmented. Suffice it to say, that it was during the period of such uncertainty as to the rule of decision when a controversy bearing a strong analogy to the case before the court was presented for decision to the Supreme Court of the State of New York, composed, at that period, of some of the ablest jurists who ever adorned that Bench.

Allusion is made, in the opinion given by Judge Spencer, to the great "uncertainty in the law upon the subject"; and, having also adverted to the necessity that a rule should be adopted to remove that difficulty, he proceeds, in the name of the court, to say: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable;" and that rule has ever since been followed in that State, and has been very extensively adopted in the courts of other States. *Brooker v. Coffin*, 5 Johns., 190; *S. C.*, 1 Am. L. Cas., 5th ed., 98.

When he delivered the judgment in that case, he was an associate justice of the court; Chancellor Kent being the Chief Justice, and participating in the decision. Fourteen years later, after he became Chief Justice of the court, he had occasion to give his reasons somewhat more fully for the conclusion then expressed. *Van Ness v. Hamilton*, 19 Johns., 367.

On that occasion he remarked, in the outset, that there exists a decided distinction between words spoken and written slander; and proceeded to say, in respect to words spoken, that the words must either have produced a temporal loss to the plaintiff by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offense involving moral turpitude; and, in our judgment, the rule applicable in such a case is there stated with sufficient fullness, and with great clearness and entire accuracy.

Controverted cases involving the same question, in great numbers, besides the one last cited, have been determined in that State by applying the same rule, which, upon the fullest consideration, was adopted in the leading case—that in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable.

Attempt was made by counsel in the case of *Widrig v. Oyer*, 13 Johns., 124, to induce the court to modify the rule by changing the word "or" into "and"; but the court refused to adopt the suggestion, and repeated and followed the rule in another case reported in the same volume. *Martin v. Stillwell*, 13 Johns., 275; see, also, *Gibbs v. Dewey*, 5 Cowen, 503; *Alexander v. Alexander*, 9 Wend., 141; *Young v. Miller*, 8 Hill, 22; in all of which the same rule is applied.

Other cases equally in point are also to be found in the reported decisions of the courts of that State, of which one or two more only will be referred to. *Bissell v. Cornell*, 24 Wend., 354. In that case, the words charged were fully proved; and the defendant moved for a nonsuit, upon the ground that the words were not in themselves actionable; but the circuit judge overruled the motion, and the defendant excepted. Both parties were subsequently heard in the Supreme Court of the State. Nelson, *Ch. J.*, giving the opinion of the court, in which it was held that the words were actionable; and the reason assigned for the conclusion is, that the words impute an indictable offense involving moral turpitude.

Defamatory words to be actionable *per se*, say that court, must impute a crime involving moral turpitude punishable by indictment. It is not enough that they impute immorality or moral dereliction merely, but the offense charged must be also indictable. At one time, said the judge delivering the opinion, it was supposed that the charge should be such as, if true, would subject the party charged to an infamous punishment; but the Supreme Court of the State refused so to hold. *Widrig v. Oyer*, 13 Johns., 124; *Wright v. Paige*, 3 Keyes, 582.

Subject to a few exceptions, it may be stated that the courts of other States have adopted substantially the same rule, and that most of the exceptional decisions are founded upon local statutes defining fornication as a crime, or providing that words imputing incontinence to an unmarried female shall be construed to impute to the party actionable misconduct.

Without the averment and proof of special

damage, says Shaw, *Ch. J.*, the plaintiff, in an action on the case for slander, must prove that the defendant uttered language the effect of which was to charge the plaintiff with some crime or offense punishable by law. *Dunell v. Fiske*, 11 Met., 552.

Speaking of actions of the kind, Parker, *Ch. J.*, said that words imputing crime to the party against whom they are spoken, which, if true, would expose him to disgraceful punishment, or imputing to him some foul and loathsome disease which would expose him to the loss of his social pleasures, are actionable, without any special damage; while words perhaps equally offensive to the individual of whom they are spoken, but which impute only some defect of moral character, are not actionable, unless a special damage is averred, or unless they are referred, by what is called a *colloquium*, to some office, business or trust which would probably be injuriously affected by the truth of such imputations. *Chaddock v. Briggs*, 18 Mass., 253.

Special reference is made to the case of *Miller v. Parish*, 8 Pick., 385, as authority to support the views of the plaintiff; but the court here is of the opinion that it has no such tendency. What the court in that case decided is, that whenever an offense is imputed, which, if proved, may subject the party to punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable; which is not different in principle from the rule laid down in the leading case—that if the charge be such, that, if true, it will subject the party falsely accused to an indictment for a crime involving moral turpitude, then the words will be in themselves actionable.

Early in her history, the Legislature of that State defined the act of fornication as a criminal offense, punishable by a fine, and which may be prosecuted by indictment; and, if the person convicted does not pay the fine, he or she may be committed to the common jail or to the house of correction. None of the counts in that case contained an averment of special damage; but the court held that, inasmuch as the words alleged imputed a criminal offense which subjected the party to punishment involving disgrace, the words were actionable; and it is not doubted that the decision is correct. Exactly the same question was decided by the same court in the same way twenty-five years later. *Kenney v. McLaughlin*, 5 Gray, 5; 1 Stat. Mass., 1786, 293. Other state courts, where the act of fornication is defined by statute as an indictable offense, have made similar decisions; but such decisions do not affect any question involved in this investigation. *Vandertip v. Roe*, 23 Pa. St., 82; *Brooker v. Coffin* [*supra*]. *Symonds v. Carter*, 82 N. H., 459; *Sen. L. Pa.*, 1860, 882; *Purdon, Dig.*, 1824, 812.

That the words uttered import the commission of an offense, say the court, cannot be doubted. It is the charge of a crime punishable by law, and of a character to degrade and disgrace the plaintiff, and exclude her from society. Though the imputation of crime, said *Higelow, J.*, is a test, whether the words spoken do amount to legal slander, yet it does not take away their actionable quality if they are used as to indicate that the party has suffered the penalty of the law, and is no longer exposed to

the danger of punishment. *Krebs v. Oliver*, 12 Gray, 242; *Fowler v. Dowdney*, 2 M. & Rob., 119.

Courts affix to words alleged as slanderous their ordinary meaning; consequently, says Shaw, *Ch. J.*, when words are set forth as having been spoken by the defendant of the plaintiff, the first question is, whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an *innuendo*, undertaking to state the same in other words, is useless and superfluous; and, if they do not, an *innuendo* cannot aid the averment, as it is a clear rule of law that an *innuendo* cannot introduce a meaning to the words broader than that which the words naturally bear, unless connected with proper introductory averments. *Alexander v. Angle*, 1 Crompt. & J., 143; *Goldstein v. Foss*, 2 Younge & J., 146; *Carter v. Andrews*, 16 Pick., 5; *Beardsley v. Tappan*, 5 Blatchf., 497.

Much discussion of the cases decided in the Supreme Court of Pennsylvania is quite unnecessary, as we have the authority of that court for saying that the leading cases establish the principle, that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offense, but one of an infamous character, or subject to an infamous or disgraceful punishment; and that an *innuendo* cannot alter, enlarge or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which might otherwise be considered ambiguous, to the material subject-matter properly on the record, by the way of averment or *colloquium*. *Goosling v. Morgan*, 32 Pa. St., 275; *Shaffer v. Kintzer*, 1 Binn., 537; *M'Clurg v. Ross*, 5 Binn., 218; *Andres v. Koppenheaver*, 3 Serg. & R., 255.

State courts have in many instances decided that words are in themselves actionable whenever a criminal offense is charged, which, if proved, may subject the party to punishment, though not ignominious, and which brings disgrace upon the complaining party; but most courts agree that no words are actionable *per se* unless they impute to the party some criminal offense which may be visited by punishment either of an infamous character, or which is calculated to affect the party injuriously in his or her social standing. *Buck v. Hersey*, 31 Me., 558; *Mills v. Wimp*, 10 B. Mon., 417; *Perdue v. Burnett*, Minor, 188; *Demarest v. Haring*, 6 Cow., 76; *Townshend*, Sl., sec. 154, Stark. Sl., 43; *Rodway v. Gray*, 31 Vt., 297.

Formulas differing in phraseology have been prescribed by different courts; but the annotators of the American Leading Cases say that the Supreme Court of the State of New York, in the case of *Brooker v. Coffin*, appear "to have reached the true principle applicable to the subject;" and we are inclined to concur in that conclusion, it being understood that words falsely spoken of another may be actionable *per se* when they impute to the party a criminal offense for which the party may be indicted and punished, even though the offense is not technically denominated infamous, if the charge involves moral turpitude, and is such as will affect injuriously the social standing of the party.

Decided support to that conclusion is derived
See 1 Otto.

from the English decisions upon the same subject, especially from those of modern date, many of which have been very satisfactorily collated by a very able text writer. Add. Torts, 8d ed., 765. Slander, in writing or in print, says the commentator, has always been considered in our law a graver and more serious wrong and injury than slander by word of the mouth, inasmuch as it is accompanied by greater coolness and deliberation, indicates greater malice, and is in general propagated wider and farther than oral slander. Written slander is punishable in certain cases, both criminally and by action, when the mere speaking of the words would not be punishable in either way. *Villers v. Monsly*, 2 Wils., 403; *Savile v. Jardine*, 2 H. Bl., 582; Bac. Abr. Sl., B; *Keiler v. Lessford*, 2 Cranch, C. C., 190.

Examples of the kind are given by the learned commentator; and he states that verbal reflections upon the chastity of an unmarried female are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage; but, if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable. 2 Bl. Com., 125, n. 6; *J'Anson v. Stuart*, 1 T. R., 748.

Comments are made in respect to verbal slander under several heads one of which is entitled, defamatory words not actionable without special damage; and the commentator proceeds to remark that mere vituperation and abuse by word of mouth, however gross, is not actionable unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Instances of a very striking character are given, every one of which is supported by the authority of an adjudged case. *Lumby v. Allday*, 1 Crompt. & J., 301; *Barnett v. Allen*, 3 H. & N., 376.

Even the judges holding the highest judicial stations in that country have felt constrained to decide, that to say of a married female that she was a liar, an infamous wretch, and that she had been all but seduced by a notorious libertine, was not actionable without averring and proving special damage. *Lynch v. Knight*, 9 H. L. Cas., 594.

Finally, the same commentator states that words imputing to a single woman that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable, even when special damage is alleged, unless it is proved, and the proposition is fully sustained by the cases cited in its support. *Wilby v. Elston*, 8 M., G. & S., 142; Add. Torts, 8d ed., 788; *Townshend*, Sl., sec. 172 and n. 516-518.

Words actionable in themselves, without proof of special damage, are next considered by the same commentator. His principal proposition under that head is, that words imputing an indictable offense are actionable *per se* without proof of any special damage, giving as a reason for the rule that they render the accused person liable to the pains and penalties of the criminal law. Beyond question, the authorities cited by the author support the proposition, and show that such is the rule of decision in all the courts of that country having jurisdiction in such cases. *Heming v. Power*, 10 Mees. & W., 570; *Alfred v. Farlow*, 8 Q. B., 854; *Edeall v. Russell*, 5 Scott, N. R., 801; *Brayne v. Cooper*,

5 Mees. & W., 250; *Barnett v. Allen* [supra]; *Davies v. Solomon*, 41 L. Jour. Q. B., 11; *Roberts v. Roberts*, 5 Best & S., 889; *Parkins v. Scott*, 1 Hurls. & C., 158.

Examined in the light of these suggestions and the authorities cited in their support, it is clear that the proposition of the plaintiff, that the words alleged are in themselves actionable, cannot be sustained.

Concede all that, and still the plaintiff suggests that she alleges in the second paragraph of her declaration that she "has been damaged and injured in her name and fame," and she contends that that averment is sufficient, in connection with the words charged, to entitle her to recover as in an action of slander for defamatory words with averment of special damage.

Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act; and it is undoubtedly true that the plaintiff in such a case may recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form, and the allegation is sustained by sufficient evidence; but the claim must be specifically set forth, in order that the defendant may be duly notified of its nature, and that the court may have the means to determine whether the alleged special damage is the natural and proximate consequence of the defamatory words alleged to have been spoken by the defendant. *Haddan v. Lott*, 15 C. B., 429.

Whenever proof of special damage is necessary to maintain an action of slander, the claim for the same must be set forth in the declaration, and it must appear that the special damage is the natural and proximate consequence of the words spoken, else the allegation will not entitle the plaintiff to recover. *Vicars v. Wilcocks*, 8 East, 8; *Knight v. Gibbs*, 1 Ad. & Ell., 46; *Ayre v. Craven*, 2 Ad. & Ell., 8; *Roberts v. Roberts* [supra].

When special damage is claimed, the nature of the special loss or injury must be particularly set forth, to support such an action for words not in themselves actionable; and, if it is not, the defendant may demur. He did demur in the case last cited; and Cockburn, *Ch. J.*, remarked that such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. Add. Torts, 3d ed., 805; *Wilby v. Elston* [supra].

Where the words are not in themselves actionable, because the offense imputed involves neither moral turpitude nor subjects the offender to an infamous punishment, special damage must be alleged and proved in order to maintain the action. *Hoag v. Hatch*, 23 Conn., 590; *Andres v. Koppenheaver* [supra]; *Buye v. Gillespie*, 2 Johns., 117.

In such a case, it is necessary that the declaration should set forth precisely in what way the special damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. *Cook v. Cook*, 100 Mass., 194.

By special damage in such a case is meant pecuniary loss; but it is well settled that the

term may also include the loss of substantial hospitality of friends. *Moore v. Meagher*, 1 Taunt., 42; *Williams v. Hill*, 19 Wend., 306.

Illustrative examples are given by the text writers in great numbers, among which are loss of marriage, loss of profitable employment, or of emoluments, profits or customers; and it was very early settled that a charge of incontinence against an unmarried female, whereby she lost her marriage, was actionable by reason of the special damage alleged and proved. *Davis v. Gardiner*, 4 Co., 16 b, pl. 11; *Reston v. Pomfreit*, Cro. Eliz., 639.

Doubt upon that subject cannot be entertained; but the special damage must be alleged in the declaration, and proved; and it is not sufficient to allege that the plaintiff "has been damaged and injured in her name and fame," which is all that is alleged in that regard in the case before the court. *Hartley v. Herring*, 8 T. R., 133; Add. Torts, 805; Hill. Torts, 2d ed., 622; *Beach v. Ranney*, 2 Hill, 309.

Tested by these considerations, it is clear that the decision of the court below, that the declaration is bad in substance, is correct.

Judgment affirmed.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, *Plff. in Err.*,

v.

HATTIE B. TISDALE.

(See S. C., 1 Otto, 238-246.)

Evidence of death.

In an action brought, not as administrator, but in an individual character, to recover an insurance upon the life of a third party, letters of administration upon the estate of such party, issued by the proper probate court, are not legal evidence of his death.

[No. 94.]

Argued Dec. 16, 1875. Decided Jan. 10, 1876.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Messrs. Frederick T. Frelinghuysen and Edwin L. Stanton, for plaintiff in error:

It will be seen that the real question in this case is, whether, in an action brought by a plaintiff in his own right upon a contract between himself and the defendant, in which the issue is, whether a person who has not been absent seven years is dead or alive, and the legal presumption is that he is alive, letters of administration issued upon his estate by a probate court, in an *ex parte* proceeding and upon very slight proof, are sufficient evidence of death, countervailing the presumption of life.

NOTE.—Methods of proving death.

Aside from direct testimony to the fact, death may be proved by a church or other registry of burial properly kept; by the official registry of the death kept pursuant to statute; by an entry in a hospital register. *Scheel v. Eldman*, 77 Ill., 391; *Sechrist v. Green*, 70 U. S., XVIII., 158; *Dow v. Andrews*, 15 Q. B., 759; *Ridgeley v. Johnson*, 11 Barb., 527; *Lewis v. Marshall*, 30 U. S. (5 Pet.), 470.

The general rule is that the burden of proof of the death of a person is incumbent on the person who asserts it, for it is presumed that the person still lives until the contrary is shown, at least until he reaches the age of one hundred, when he may be presumed to be dead in the ordinary course of na-

shifting the burden of proof and, in the absence of contradictory evidence, establishing the death. As this action was brought by the plaintiff in her own right, and is based upon a contract with herself, it matters not as respects the admissibility and effect of the letters of administration, whether they were granted to herself or to some third person, not a party to the action.

I. It is believed that, upon a review of adjudicated cases and the opinions of text writers, the ruling of the court below will be found to be opposed to the weight of authority upon this question. *French v. French*, 1 Dick., 268, is important as showing that, in general, letters of administration are not *prima facie* evidence of debt.

Lloyd v. Finlayson, 2 Esp., 564; *Thompson v. Donaldson*, 3 Esp., 64; *Moons v. De Barnales*, 1 Russ., 807; *Clayton v. Gresham*, 10 Ves., 288; *Leach v. Leach*, 8 Jur., 211.

Newman v. Jenkins, 10 Pick., 515, was an action brought by an administrator and, as in the case of *Lloyd v. Finlayson*, there was only a plea to the merits. In such a case, therefore, it was held that the letters of administration were conclusive. The reason sustaining such a decision is stated by Lord Kenyon in *Lloyd v. Finlayson*.

Kelland v. Lebering, 2 Wash. C. C., 201; *Cunningham v. Smith*, 70 Pa., 450; *Belden v. Meeker*, 47 N. Y., 308, were similar cases.

The actions were brought by administrators, and the pleadings did not put in issue the plaintiff's right to sue in that capacity.

In *Jeffers v. Radcliff*, 10 N. H., 245, it was held that the grant of letters of administration

on the estate of an individual is *prima facie* evidence of debt; but the court admitted that the English law is different.

That letters of administration are not evidence of the death of the party is laid down in 2 Stark. Ev., 385, tit. Death; 1 Phil. Ev., 343; Tamlyn, Ev., 154 (41 Law Lib.), and in Hubback Succ., 162 (37 Law Lib.). Only in 1 Greenl., sec. 550, is the statement that the grant of letters of administration is, in general, *prima facie* evidence of the intestate's death. The authorities cited in the earlier edition of the work in support of this proposition are *Thompson v. Donaldson* (*supra*); *French v. French*, 1 Dick., 268. These authorities are against, and not in favor of the propositions stated by Greenleaf.

Upon principle and analogy, as well as according to adjudicated cases and the views of text writers, it would seem that it should be held that letters of administration are not, in such cases as the one at bar, admissible proof of death. It can hardly be contended that they are admissible for such a purpose upon any other ground than by reason of being a judicial act, as being in the nature of a decree *in rem*, and as proving the facts upon the supposed existence of which the judgment is founded. But the judgment of a court of concurrent or exclusive jurisdiction is not evidence of any matter which comes collaterally in question, although within its jurisdiction, nor of any matter to be inferred by argument from the judgment.

De Gray, Ch. J., in giving judgment in *The Duchess of Kingston's case*, 11 St. Tr., 261, 20 Howell, St. Tr., 355; 1 Stark. Ev., 257; *Blackham's case*, 1 Salk., 290; 1 Phil. Ev.

ture. *O'Gara v. Eisenlohr*, 38 N. Y., 296; *Duke of Cumberland v. Graves*, 9 Barb., 595; *Watson v. Tindall*, 24 Ga., 274; *Sprigg v. Moale*, 28 Md., 497; *Hayes v. Berwick*, 2 Mart., 138.

Where there is no definite evidence of death, evidence of all circumstances is received, and the question is whether they are such as show a strong probability of death, upon which a court should act. Such circumstances may be aided by the presumption of innocence, as when continued life of party would prove guilt in a second marriage. *Merritt v. Thompson*, 1 Hilt., 550; *Kelly v. Drew*, 12 Allen, 107; *Smith v. Knowlton*, 11 N. H., 191.

Death within a very recent time may be inferred from the circumstances of absence or disappearance. The presumption rests on the fact that it is strange that a man should absent himself without communicating with his friends. It is aided by whatever, in his situation, makes it more strange and impaired by whatever makes it easily credible. *Lancaster v. Wash. L. Ins. Co.*, 62 Mo., 121; *In re Beasley Trusts*, 7 L. R. Eq., 498; *Stouvenel v. Stephens*, 2 Daly, 319; *John Hancock Ins. Co. v. Moore*, 16 Am. L. Reg. N. S., 214; *Sheldon v. Ferris*, 45 Barb., 124; *Hancock v. Am. Ins. Co.*, 62 Mo., 2; S. C., 3 Cent. L. J., 595; *Garden v. Garden*, 2 Houst., 574; *Nepean v. Knight*, 2 Mees. & W., 913.

Sudden disappearance alone is not enough in the case of a man without fixed abode, social or pecuniary ties. *Hancock v. Am. Ins. Co.*, 62 Mo., 26; S. C., 3 Cent. L. J., 595.

Evidence that, at last accounts, the absentee was exposed to great peril may, in connection with failure of further tidings, raise a presumption of death consequent on the peril. *Merritt v. Thompson*, 1 Hilt., 550; *Gerry v. Post*, 13 How. Pr., 118; *White v. Mann*, 26 Me., 361; *Eagle's case*, 8 Abb. Pr., 218; S. C., 4 Bradf., 117; *Lancaster v. Wash. L. Ins. Co.*, 62 Mo., 121.

Evidence that insurers of vessel have paid insurance as a total loss is admissible as tending to prove death of one on board. So is the concurrence of a particular storm or hurricane season with the route of the voyage. *In re Hutton*, 1 Curt., 595; *Gibbs v. Vincent*, 11 Rich., 323; *Goods of Main*, 1 Sw. & Tr., 11; *Silleck v. Booth*, 1 Younge & C., 117.

See 1 OTTO.

There is a legal presumption of death from absence of seven years, in analogy to the English statute in reference to life estates and statutes based on it, which is now well recognized. 19 Car. II., chap. 6; 1 N. Y. R. S., 749, sec. 6; *King v. Paddock*, 18 Johns., 141; *Osborn v. Allen*, 26 N. J. L., 388; *Forsyth v. Clark*, 1 Fost., 409; *George v. Jesson*, 6 East, 80.

To raise the presumption of death from absence, there must be affirmative proof of absence and of reasonable inquiry at the last place of residence, and of persons likely to know and of his relatives. The reasonableness of inquiry is a mixed question of law and fact. *Stinchfield v. Emerson*, 52 Me., 465; *McCartee v. Camel*, 1 Barb. Ch., 455; *Doc v. Andrews*, 15 Q. B., 760; *Clarke v. Cummings*, 5 Barb., 839; *Spurr v. Trimble*, 1 A. K. Marsh., 278.

This presumption of death is rebutted by very slight evidence—a single letter from the person within the seven years destroys it; or testimony of a witness that he has heard the person is living. *Smith v. Smith*, 49 Ala., 153; *Flynn v. Coffee*, 12 Allen, 123; *Am. L. Ins. Co. v. Rosenagle*, 77 Pa. St., 507; *Brown v. Jewett*, 18 N. H., 220; *Keech v. Rinehart*, 10 Pa. St., 214.

Death may also be proved by hearsay, by testimony of relatives (1 Tayl. Ev., 570, sec. 572; *Masons v. Fuller*, 45 Vt., 29); or by inscription on tombstone (*Rosc. N. P.*, 47; 16 Gray, 171); or by entry in family Bible (*Lewis v. Marshall*, 30 U. S., 5 Pet., 470; *Berkeley Peerage case*, 4 Camp., 401); or by the fact of family wearing mourning (*Succession of Jones*, 12 La. Ann., 397); or by general repute among acquaintances, where he left no kindred, or in connection with family repute where he died abroad. *Ringhouse v. Keover*, 49 Ill., 470; *Ewing v. Savary*, 3 Bibb., 235.

Letters testamentary or of administration are not competent to prove death as a substantive part of a cause of action or defense unless, perhaps, by lapse of time, they may become competent as hearsay. *Carroll v. Carroll*, 60 N. Y., 123; *Thompson v. Donaldson*, 3 Esp., 63; *Ins. Co. v. Tisdale*, *supra*; *English v. Murray*, 13 Tex., 366; *Munro v. Merchant*, 26 Barb., 383; *Russell v. Schuyler*, 23 Wend., 277.

Messrs. George Crane, H. D. Bean and D. N. Cooley, for defendant in error:

The exceptions relating to the letters of administration, issued to the defendant in error by the County Court of Dubuque Co., Iowa, Dec. 18, 1866, raised the questions whether said letters of administration were properly admitted in evidence, and if properly admitted, whether they were *prima facie* evidence of the death of Edgar Tisdale, as stated by the court below in its charge to the jury.

1. That they were competent as evidence of death, and *prima facie* evidence of that fact, see the following authorities, viz.: *Tisdale v. Ins. Co.*, 26 Iowa, 170; *Jeffers v. Radcliff*, 10 N. H., 242; *Newman v. Jenkins*, 10 Pick., 516; *Kelland v. Lebering*, 2 Wash. C. C., 201; *Cunningham v. Smith*, 70 Pa., 450; *Munroe v. Merchant*, 26 Barb., 383, 397; *Belden v. Meeker*, 47 N. Y., 308; *French v. Frazier*, 7 J. J. Marsh., 431; 1 Greenl. Ev., 8th ed., sec. 550, and cases there cited; 2 Greenl. Ev., 8th ed., secs. 278 a, b, c, d, and 355; *Tisdale v. Ins. Co.*, 28 Iowa, 12.

2. As the whole scope and bearing of the charge on this subject must be taken together (*Magniac v. Thompson*, 7 Pet., 348), this court will observe that the court below permitted the jury to attach less weight to the letters than some of the authorities attached to them.

Mr. Justice Hunt delivered the opinion of the court:

This action was brought upon a policy of insurance issued to Mrs. Tisdale upon the life of her husband. Evidence was given tending to show the death of Mr. Tisdale, on the 24th day of September, 1866. This evidence consisted chiefly in the sudden and mysterious disappearance of Mr. Tisdale, under circumstances making probable his death by violence. It would seem, from the charge of the judge, that evidence was given by the defendant, tending to show that he had been seen alive some months after the date of his supposed death.

To sustain her case, the plaintiff offered in evidence letters of administration upon the estate of her husband, issued to her by the County Court of Dubuque County, Iowa. The defendant objected to the admission of this evidence. The objection was overruled and the letters were read in evidence, to which the defendant excepted.

The same question is presented, and perhaps with more distinctness, in the charge of the judge. He said to the jury: "The real question is, whether Edgar Tisdale was dead at the time of issuing the letters of administration. It is incumbent on the plaintiff to prove that fact. She has shown as evidence of that fact, letters of administration issued to her as administratrix by the probate judge. It is the duty of the court to instruct you that this makes a *prima facie* case for the plaintiff, and changes the burden of proof from the plaintiff to the defendants. * * * Without contradictory evidence, these (the letters of administration) give the plaintiff the right to recover." To the charge in this respect the defendant excepted.

In an action brought, not as administrator, but in an individual character, to recover an individual debt, where the right of action depends upon the death of a third party—to wit: an insurance upon his life—do letters of admin-

istration upon the estate of such party, issued by the proper probate court, afford legal evidence of his death? This is the question we are called upon to decide. It is presented sharply, and is the only question in the case.

The authority in favor of the admission of the letters as evidence of the death of the party, in a suit between strangers, is a general statement to that effect in 1 Greenl. Ev., sec. 550. The cases cited by the writer in support of the proposition are *Thompson v. Donaldson*, 8 Esp., 64; *French v. French*, Dick., 268; *Succession of Hamblin*, 3 Rob. (La.), 180; *Jeffers v. Radcliff*, 10 N. H., 245. In the case first cited, the authority does not support Mr. Greenleaf's statement. It was held that the letters did not afford sufficient proof of death, and, no further evidence being given, the verdict was against the claimant. In *French v. French*, the court held in terms against the theory that the letters were evidence of death, "but, under all the circumstances, admitted the probate as evidence of death." This case was that of a bill filed by an heir against one in possession of the estate; and in that case Mr. Greenleaf hardly contends that that the letters are evidence of death. In *Tisdale v. Ins. Co.*, 26 Iowa, 177, and in the same case in 28 Iowa, 12, cited by the defendant in error, the law was held as claimed by her. The other cases cited by the defendant in error are those where the administrator or executor was a party to the suit in his representative capacity, in relation to which a different rule prevails.

In the New Hampshire case above cited, there was evidence to sustain the ruling, independently of the letters; and the case concedes that the law is otherwise in England, and bases itself upon the peculiar organization of the courts of that State.

On the other hand, the text writers—Phil. Ev., 2d vol., 93 m, ed. 1868; Tamlyn, 48 L. Lib., 154, referring to *Moons v. De Barnales*; Hubback, Succ., 162, 51 L. Lib., concur against the rules laid down by Mr. Greenleaf.

In *Moons v. De Barnales*, 1 Russ., 307, it was held that letters of administration were not *prima facie* evidence of death, and the defect was supplied by other evidence. *Ld. Eldon* says, in *Clayton v. Gresham*, 10 Ves., 268, that it is the constant practice to require proof of death, and that probate is not sufficient. In *Leach v. Leach*, 8 Jur., 211, Sir Knight Bruce refused to order the payment of money upon letters alone, but required other evidence. In *Blackham's case*, 1 Salk., 290, it was held that the sentence of the spiritual court in granting letters is not evidence upon any collateral matter which would have prevented the issuing of the letters.

In speakings of judgments *in rem*, and where the judgment may be evidence against one not a party or privy to it, Mr. Starkie says: "This class comprehends cases relating to marriage and bastardy where the ordinary has certified; sentences relating to marriage and testamentary matters in the spiritual court." 1 Stark. Ev., 372, m. What is meant by this is explained at a subsequent place, where he says: "The grant of a probate in the spiritual court is conclusive evidence against all as to the title to personality, and to all rights incident to the character of an executor or administrator." P. 374, m. He cites, in support of this statement, the case of *Allen*

v. *Dundas*, 3 T. R., 125, that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor. The grant is conclusive in all business transacted as executor, and concerning the duties of the executor, that it was properly made.

This accords with the principle hereafter laid down.

The chief ground of argument to admit letters testamentary as evidence of the death of the party is, that the order of the Probate Court issuing them is an order or judgment *in rem*. But a judgment *in rem* is not *prima facie* evidence; it is conclusive of the point adjudicated, unless impeached for fraud. 1 Stark. Ev., 872, *m. Freeman, infra*. If admissible on this principle, the letters were conclusive evidence of the death of Tisdale. But this is not claimed by any argument.

Again: the probate court has never adjudicated that Tisdale was dead. Death was not the *res* presented to it. Shall Mrs. Tisdale receive letters of administration, was the *res*; and upon that only has there been an adjudication. Hubback, *supra*, 162, *m.*

The letters issued to an executor or an administrator by a probate court are, as a general rule, evidence only of their own existence. They prove, that is to say, that the authority incident to that office or duty has been devolved upon the person therein named, that he has been appointed, and that he is executor or administrator of the party therein assumed to have departed this life. Different States have different provisions as to who may be executor or administrator, excluding some persons and preferring others, in the order and manner in their statutes specified. Thus persons convicted of infamous crime are excluded from this office and persons of notoriously evil lives may be passed by in the discretion of the probate court. Sons or daughters or widows are entitled to take in preference to others; unmarried women are entitled in preference to married women. Certain notices may be, and usually are, required to be given of the proceedings to obtain letters; and the letters are the evidence that the proceedings have been regularly taken, and that the person or persons therein named are those by law entitled to the office. Upon these points the court has adjudicated. No proof to the contrary can be admitted in an action brought by the executor as such. Parties wishing to contest that point must do it before the probate court at the time application is made for the letters, or upon subsequent application, as the case may require.

In an action brought by such executor or administrator touching the collection and settlement of the estate of the deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased. The letters are conclusive evidence of the probate of the will. It cannot be avoided collaterally by showing that it is a forgery, or that there is a subsequent will. The determination of the Probate Court is upon these precise points, and is conclusive. 2 Smith L. Cas., 6th Am. ed., 669; *Vanderpoel v. Van Valkenburg*, 6 N. Y., 190; *Colton v. Ross*, 2 Paige, 396; *Freem. Judg.*, 507, citing numerous cases.

If the present suit were brought by the plaintiff as executor or administrator to collect a debt

due to her deceased husband, or to establish a claim arising under a will, of which probate had been made by her, she would have been within these rules. The letters testamentary would not only have been competent evidence, but they would have been conclusive of her right to bring the suit, and unimpeachable except for fraud.

Such, however, is not the case before us. The suit is by the plaintiff as an individual, to recover a debt alleged to be due to her as an individual. It is a distinct and separate proceeding, in which the question of the death of the husband has never been passed upon. That fact must be established by proof competent upon common law principles.

The books abound in cases which show that a judgment upon the precise point in controversy, cannot be given in evidence in another suit against one not a party or privy to the record. The rule is applied not only to civil cases, but to criminal cases and to public judicial proceedings, which are of the nature of judgments *in rem*.

If an indictment for an assault and battery by A upon B is prosecuted to a trial and conviction, the record is conclusive evidence in favor of A upon a subsequent indictment for the same offense; but, if B sues A for the same assault and battery, it cannot be doubted that it would be incompetent to introduce that record as evidence of the offense. For this purpose, it is *inter alios acta*. B was no party to that proceeding. In theory of law he was not responsible for it, nor capable of being benefited by it. 1 Stark. Ev., 817 *m.*

So, if B should afterwards be indicted for an assault upon A, arising out of the same transaction, the record would not be competent evidence to show that A, and not B, was in fact the offending party.

In some States, provision is made for the admeasurement and setting apart of dower to the widow of a deceased person. Officers are appointed for this purpose, who make their certificate awarding particular property to her use, and file their report in the proper office. Although this certificate is judicial in its character, and assumes that the deceased had title to the property described, and the certificate is valueless except upon that supposition, it has still been held that it is no evidence of title, and that the title must be proved as in other cases. *Jackson v. Randall*, 5 Cow., 168; *Jackson v. Dewitt*, 6 Cow., 816.

It has been held that a comptroller's deed for the non-payment of a tax due the State is not even *prima facie* evidence of the facts giving him the right to sell, such as the assessment and non-payment of the tax, although they are recited in the deed, and this deed is in compliance with the statute. These facts must have existed to give a right to sell; but they are not established by the deed. They must be made out by independent proof. *Tallman v. White*, 2 N. Y., 66; *Williams v. Peyton*, 4 Wheat., 77; *Beekman v. Bigham*, 5 N. Y., 366.

A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years, and is of good moral character. This certificate is, against all the world, a judgment

of citizenship, from which may follow the right to vote and hold property. It is conclusive as such; but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant. *Campbell v. Gordon*, 6 Cranch, 176; *Stark v. Ins. Co.*, 7 Cranch, 420.

The certificate of steamboat inspectors, under the Act of Congress of 1852, is evidence that the vessel was inspected by the proper officer; but it is held that it is not evidence of the facts therein recited, when drawn in question by a stranger, although the officer was required by law to make a return of such facts. *Erickson v. Smith*, 2 Abb. App. Dec. (N. Y.), 64; *S. C.*, 38 How. Pr., 454.

So it has been held, that where a sheriff sells real estate, giving to the purchaser a certificate thereof, although there can lawfully be no sale unless there be a previous judgment, and although the sale is based upon and assumes such judgment, and although the law requires the sheriff to give such certificate, the recital by the sheriff of such judgment furnishes no evidence thereof. It must be proved independently of the certificate. *Anderson v. James*, 4 Rob. (N. Y.), 85.

So on an application by a wife for alimony, pending a divorced suit prosecuted against her, the fact that her husband has recovered a verdict against a third person for criminal connection with her has been held not to be even presumptive evidence of her guilt. *Williams v. Williams*, 8 Barb. Ch., 628.

Authorities of this nature might be greatly extended. Enough has been said to demonstrate that neither upon principle nor authority was it proper, in the individual suit of Mrs. Tisdale against a stranger, to admit letters of administration upon the estate of her husband as evidence of his death.

The judgment must be reversed and a new trial had.

Cited—94 U. S., 25.

JOHN W. BUTTERFIELD, *Appt.*,

v.

GEORGE USHER.

(See S. C., 1 Otto, 246-249.)

Final decree, what is not.

A decree which simply set aside one sale that had been made and ordered another, is not final, and on appeal from it, this court has no jurisdiction.

[No. 76.]

Argued Dec. 10, 1875. Decided Jan. 10, 1876.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. Enoch Totten, for appellant.

Mr. R. T. Merrick, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

On the 7th June, 1872, a decree was rendered

by the Supreme Court of the District of Columbia in a suit in equity between Horace S. Johnson, plaintiff, and George Usher, defendant, directing a sale of certain lands, the property of Usher. In pursuance of this decree, a sale of the property was made to John W. Butterfield on the 30th of September. This sale was reported to the court Oct. 16; and on the 15th November an order of confirmation was entered, unless cause to the contrary should be shown on or before Dec. 10. Cause was not shown by the time limited; and thereupon, on the 12th December, Butterfield paid the amount of his bid to the trustee who made the sale, and received from him a deed of the property. Previous to this time, there had been no order of the court directing a conveyance; but on that day the trustee reported to the court that he had received the purchase money, and executed the deed; and thereupon an order was entered, ratifying and confirming the sale and approving the deed. This deed was left for record in the land records of the District on the day of its execution.

On the 14th December, and during the same term of the court, the order of Dec. 12 was set aside on the petition of Usher, and leave granted him until Dec. 21 to show cause against the confirmation. At the appointed time he did appear, and made his showing; but on the 25th January an order of confirmation was again entered. From this order Usher appealed to the general Term, where, on the 7th June, the following decree was entered:

"Upon the offer of the defendant making an advance on the sale heretofore made, it is ordered, adjudged and decreed by the court, this seventh day of June, A. D. 1873, that the sale heretofore made in this cause by Francis Miller, Esq., trustee, be, and the same is hereby vacated and set aside. And it is further ordered that the said trustee may proceed to advertise and resell the property, and that the expenses of the cause heretofore incurred may be paid out of the proceeds to be realized from the sale hereby directed to be made. And it is further ordered that the money in the hands of the trustee be paid back to the purchaser, with interest thereon at the rate of ten per cent. per annum, to be paid by the defendant Usher, and to be deducted by the trustee from the proceeds to come into his hands from the further sale hereby ordered. And it is further ordered that the trustee, in reselling the property, put up the same at a price not lower than the sum realized at the former sale, together with the sum of five hundred dollars advance offered by George W. Hauptman."

From this decree Butterfield has taken this appeal. He alone appears as appellant, and Usher alone as appellee.

An appeal lies to this court from the final decree of the Supreme Court of the District of Columbia in any case where the matter in dispute exceeds the sum of \$1,000. R. S. sec. 705.

"In case of the sale of things, real or personal, under a decree in equity, the decree confirming the sale shall divest the right, title or interest sold, out of the former owner, party to the suit, and vest it in the purchaser, without any conveyance by the officer or agent of the court conducting the sale; and the decree shall be notice to all the world of this transfer of title

NOTE.—What is "final decree" or judgment of state or other court from which appeal lies. See note to *Gibbons v. Ogden*, 19 U. S. (6 Wheat.), 448.

when a copy thereof shall be registered among the land records of the District; but the court may, nevertheless, order its officer or agent to make a conveyance, if that mode be deemed preferable in particular cases." R. S. relating to the Dist. of Col., sec. 798.

The decree here appealed from disposed finally of a motion made in the case, but not of the case itself. It simply set aside one sale that had been made, and ordered another. A decree confirming the sale would have been final. But this decree is analogous to a judgment of reversal with directions for a new trial or a new hearing, which, as has been often held, is not final. Where the practice allows appeals from interlocutory decrees, an appeal might lie from such a decree as this. Such was the practice in New York. 2 R. S. (N. Y.), 605, secs. 78, 79; R. S., 178, secs. 59, 62. Consequently it was said, in *Delaplaine v. Lawrence*, 10 Paige, 604, "In sales by masters, under decrees and orders of this court, the purchasers who have bid off the property and paid their deposits in good faith are considered as having inchoate rights, which entitle them to a hearing upon the question whether the sales shall be set aside; and, if the court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal." But our jurisdiction upon appeal is statutory only. If some Act of Congress does not authorize a case to be brought here, we cannot take jurisdiction. Appeals cannot be taken to this court from the Supreme Court of the District, except after a final decree in the case by that court. The decree in this case not being final, we have no jurisdiction.

We do not wish to be understood as holding that a purchaser at a sale under a decree in equity may not, at a proper stage of the case, appeal from a decree affecting his interests. All we do decide is, that there cannot be such an appeal to this court until the proceedings for the sale under the original decree are ended.

In *Blossom v. R. R. Co.*, 1 Wall., 655 [68 U. S., XVII., 673], and *S. O.*, 3 Wall., 196 [70 U. S., XVIII., 43], we entertained such an appeal; but the decree there appealed from was final. There was no order to resell, for the reason that, between the time of Blossom's bid and the time of the order of the court appealed from, the decree for the satisfaction of which the sale had been ordered was paid. The decree against Blossom, therefore, was the last which the court could make in the case. It ended the proceedings, and dismissed the parties from further attendance upon the court for any purpose connected with that action.

This appeal is, therefore, dismissed for want of jurisdiction.

Cited—96 U. S., 714; 100 U. S., 155.

JOHN MÜLLER AND JOHN ZIMMER, *Plffs.*
in *Err.*,

v.

LOUIS EHLERS.

(See S. C., 1 Otto, 249-251.)

Bill of exceptions—order to file nunc pro tunc.
See 1 Otto.

Where there is no extension of time granted and no consent given to file bill of exceptions, an order of the court, made at the next Term after judgment was rendered directing that the bill of exceptions be filed in the cause as of the date of the trial, is a nullity; and the bill of exceptions, although returned here, cannot be considered as part of the record.

[No. 97.]

Argued Dec. 16, 1875. Decided Jan. 10, 1876.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The defendant in error brought this suit in the court below, to recover the W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 88, Town 12, N. of range 21 E. in the County of Ozaukee, State of Wisconsin, claiming title under a sheriff's deed on foreclosure of mortgage.

The plaintiffs in error admit being in possession, asserting title in themselves, derived by land contract from George W. Foster and leased from George A. Rowe. John Zimmer is but a sub-tenant of part of the premises under John Müller.

A jury was waived and the trial had before the court.

Finding and judgment were in favor of the defendant in error, who was the plaintiff in the court below.

The case is further stated by the court.

Mr. Matt. H. Carpenter, for plaintiffs in error.

Messrs. F. W. Cotshausen and J. P. O. Cottrill, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The parties to this suit, by stipulation in writing filed with the clerk, waived a jury, and submitted to a trial by the court, which was had at the October Term, A. D. 1872, when the case was taken under advisement. At the next term, and on the 28th April, 1873, the court found generally for the plaintiff: whereupon defendants moved for a new trial. This motion was continued until the next Term; when on the 15th July, it was overruled, and judgment entered on the finding.

On the 25th July, 1873, this writ of error, returnable on the second Monday of October then next ensuing, was sued out and served, and on the same day a *supersedeas* bond was approved and filed. The citation was filed Aug. 4, 1873.

Down to this date, as appears by the record, a bill of exceptions had not been signed or allowed, nor time given, either by consent of the parties or by order of the court, to prepare one. In this condition of the case, the court adjourned for the Term.

At the next Term, on the 27th October, 1873, and after the return day of the writ of error, a bill of exceptions was signed and filed by order of the court, as of the 28th April, 1873. It nowhere appears from the record that this was done with the consent of the plaintiff, or even with his knowledge. It is for errors appearing in this bill of exceptions alone that a reversal of the judgment is asked.

It perhaps sufficiently appears from the bill of exceptions in this case, if it is to be taken as a part of the record, that the rulings complained of were excepted to in proper form at the time of the trial; but it does not appear that the bill of exceptions was filed, signed, tendered for

signature or even prepared before the adjournment of the court for the Term at which the judgment was rendered. No notice was given to the plaintiff of any intention on the part of the defendants to ask for the allowance of a bill of exceptions, either during the Term or after. No application was made to the court for an extension of time for that purpose. No such extension of time was granted, and no consent given.

Upon the adjournment for the Term the parties were out of court, and the litigation there was at an end. The plaintiff was discharged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the court, therefore, made at the next Term, directing that the bill of exceptions be filed in the cause as of April 28, 1873, was a nullity. For this reason, upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record.

This case differs very materially from that of *U. S. v. Breitling*, 20 How., 253 [61 U. S., XV., 901]. There the bill of exceptions was prepared during the Term, and presented to the court for allowance four days before the adjournment. It was handed back to the attorney presenting it, three days before the adjournment, with the request that he submit it to the opposing counsel. Delay occurred, and the signature was not actually affixed until after the Term. Under the special circumstances of that case, the signature, after the Term, was recognized as proper. The particular grounds for this ruling are not stated; but it was probably for the reason, that, upon the facts stated, the consent to further time beyond the term for the settling of the exceptions might fairly be presumed. That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation. It was said by this court in *Genes v. Bonnemere*, 7 Wall., 565 [74 U. S., XIX., 227], that "To permit the judge to make a statement of the facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record entirely in the power of the judge, without hearing and without remedy." This language is substantially adopted in *Flanders v. Tweed*, 9 Wall., 425 [76 U. S., XIX., 678], where it was said "The statement of facts by the judge is filed upon the 29th May, 1868, nearly three months after the rendition of the judgment. This is an irregularity, for which this court is bound to disregard it, and to treat it as no part of the record."

As early as *Walton v. U. S.*, 9 Wheat., 651, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the Term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the Term or consent of the parties, save under very extraordinary circumstances. Here we find no order of the court, no consent of the parties, and no such circumstances as will justify a departure from the rule. A judge cannot act judicially upon the rights of parties,

after the parties in due course of proceeding have both in law and in fact been dismissed from the court.

The judgment is affirmed.

Cited—95 U. S., 142; 14 Blatchf., 336, 356, 359.

REUBEN WRIGHT, *Plff. in Err.*,

v.

JONAS M. TEBBITTS.

(See S. C., 1 Otto, 252-254.)

Attorney's compensation—share of recovery.

1. An agreement, express or implied, to pay a share of the amount recovered for purely professional services in prosecuting a claim, is valid.

2. There is nothing illegal, immoral or against public policy, in a professional engagement to present and prosecute a claim before a commission, for such compensation.

[No. 98.]

Argued Dec. 17, 1875. Decided Jan. 10, 1876.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. Geo. W. Paschal and J. W. Moore, for plaintiff in error:

The authorities are everywhere that if a contract be against law, be prohibited by law, be against good morals or public policy, it is void.

Bk. v. Owens, 2 Pet., 527; *Harris v. Runnels*, 12 How., 79; *Marshall v. R. R. Co.*, 16 How., 384; *Milne v. Huber*, 3 McLean, 212; *Kennett v. Chambers*, 14 How., 38; *Wilson v. LeRoy*, 1 Brock., 447; *Piatt v. Oliver*, 1 McLean, 295; *S. C. v. Oliver v. Piatt*, 3 How., 333; and see the cases collected in Brightly's Fed. Dig., Contracts, secs. 169-249.

This case is certainly within the searching review of *Trist v. Child*, 21 Wall., 446 (88 U. S., XXII., 628).

The character of the services rendered or to be rendered were contrary to public policy and such as to vacate the contract. They were services to swell the amount of a claim against the Choctaw funds in the hands of the United States; the plaintiff was to become the advocate to plead before the agent of the trustee against the *cestui que trust*. The United States stood guardian for the Indians, and had no right to permit this interference against its wards. It was no tribunal for counsel.

Equally fatal to the claim is the fact, that it was a bargain to pay to the plaintiff one tenth of all that the plaintiff should receive out of a particular fund. This comes within the precise definition of champerty.

4 Bl. Com., 735; 1 Inst., 368; *Belding v. Pitkin*, 2 Cal., 149; *Hunt v. Hale*, 8 Yerg., 142.

Mr. R. D. Mussey, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

Wright, the defendant below, a licensed trader in the Choctaw country at the commencement of the rebellion, claimed that he had sustained

NOTE.—Attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage. Purchase of interest in suit or subject of litigation by attorney. See note to *McMicken v. Perin*, 59 U. S., XV., 504.

large losses by the use of his property by the Choctaw Nation, and that large sums were due to him for goods taken by or sold to members of the Nation, and for money advanced to it. By a Treaty, concluded April 28, 1866, between the United States and the Choctaws and Chickasaws, it was stipulated and agreed that this claim, with others, should be investigated and examined by a commission to be appointed by the President, and that such sum as might be found due should be paid by the United States out of any money belonging to that nation in the possession of the United States. 14 Stat. at L., 781.

Tebbits, the plaintiff below, an attorney at law, was employed by Wright to present and prosecute his claim before this commission; and he accordingly, in August, 1866, appeared before the commissioners, and presented an argument in its support. Afterwards, on the 9th August, 1866, Wright executed to Tebbits a memorandum in writing, as follows:

"Jonas M. Tebbits having rendered valuable services to me in securing my claims under the 50th article of the Treaty of April 28 with the Choctaws and Chickasaws, I hereby bind myself to pay him one tenth of whatever I may realize from the Choctaw Indians under said article, whenever the money comes into my hands; which payment, when made, will be in full compliance with my verbal contract, made in April last, with John B. Luce."

Wright subsequently realized on his claim \$20,541.28; the last payment having been made to him in June, 1869. This suit was brought by Tebbits to recover compensation for his services, which Wright refused to pay. He claimed \$2,054, being ten per cent. on the sum paid to Wright; and for this amount he obtained judgment upon the verdict of a jury.

To reverse this judgment, the present writ of error has been prosecuted.

The errors assigned upon this record are, in substance, that the contract given in evidence is illegal:

1. Because it is an assignment of a one tenth interest in the claim of Wright, and not "Freely made and executed in the presence of at least two witnesses, after the allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof," as required by sec. 3477, R. S.;

2. Because it is tainted with illegality and immorality, and is against public policy; and,

3. Because it is champertous, as it was a bargain to pay one tenth of whatever might be collected.

1. As to the first objection, all that need be said is, that there is no claim of any lien upon the fund. All Wright undertakes to do is to pay "one tenth of whatever he may realize from the Choctaw Indians, * * * whenever the money comes into his hands." Tebbits asserts no claim upon the fund: he only asks that he may be paid by Wright for his services after the money has been collected, and in accordance with the stipulations of the contract or memorandum.

2. Tebbits has not engaged in any improper or illegal service. Wright had a claim against the Choctaw Indians, which they, by their Treaty, had agreed to submit to an adjudication by commissioners to be appointed for that purpose. See 1 Otto.

He employed Tebbits to appear for him professionally before that commission, and enforce his claim. He did appear, and presented an argument in behalf of his client. This is all he did, and all he engaged to do. It was legitimate service rendered in a legitimate employment. To deprive a claimant of the means of obtaining such professional service would be to deprive him, in many instances, of the means of asserting and enforcing his claim. In this case, so far as anything appears by the record, Wright neither contracted for nor received anything else than legitimate and honorable professional assistance. Such an agreement we held to be valid in *Trist v. Child*, 21 Wall., 450 [88 U. S., XXII., 624], for we then said, speaking through *Mr. Justice Swayne*, "We entertain no doubt * * * an agreement, express or implied, for purely professional services, is valid." Such services, we say, "rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable." In fact, the commission acting on this claim was a *quasi* court. It was, in no material respect, for all the purposes of the present controversy, different from the "Court of Commissioners of Alabama Claims," or the "Southern Claims Commission," or the "Mexican Claims Commission," or "Spanish Claims Commission," which have been called together, in pursuance of treaty stipulations or otherwise, to settle and adjust disputed claims, for the purpose of their ultimate payment and satisfaction. There is nothing illegal, immoral or against public policy, in a professional engagement to present and prosecute such claims before such tribunals.

3. In *Wylie v. Coxe*, 15 How., 415, we decided that an agreement to pay a reasonable percentage upon the amount of recovery was not an illegal contract. Here, after the service had been rendered, and after, as was supposed, the claim had been secured, Wright agreed to pay ten per cent. of the amount eventually realized as compensation for the labor done. We see no reason to find fault with this; and the jury seem also to have adopted this rule, which the parties established for themselves, as presenting the true criterion for estimating the reasonable value of the services rendered.

The judgment is affirmed.

Cited—23 U. S., 556.

SARAH McMURRAY, ISAAC S. HOLLIDGE, Trustee, AND WILLIAM H. HOLLIDGE, *Appts.*,

v.

AUSTIN P. BROWN.

(See S. C., 1 Otto, 257-267.)

Mechanics' lien laws—effect of accepting different security.

Lien laws do not in general create a lien in favor of a material man or mechanic who has accepted in full a different security at the time the contract or agreement was made, but a mere promise to give such a security, if subsequently broken, will not impair a right to such a lien.

[No. 59.]

Argued Dec. 1, 1875.

Decided Jan. 10, 1876.

APPEAL from the Supreme Court of the District of Columbia.

This was a suit brought by the appellee in the Supreme Court of the District of Columbia, to enforce a lien for materials furnished for houses erected on lots 86 and 87, in Square 511, in the City of Washington. The cause was first heard before *Mr. Justice Wylie*, holding an equity Term of said court, and a decree was passed granting the relief sought by complainant. Upon appeal, this decree was affirmed by the Supreme Court of the District in General Term. Thereupon, an appeal was taken to this court.

The lots were owned by Sarah McMurray, one of the defendants below and appellants here. The two other appellants were made parties because to one of them, Isaac S. Hollidge, there had, before the inception of the complainants' lien, been executed a deed of trust from Sarah McMurray, to secure a debt due to the third defendant, William H. Hollidge. It is admitted by stipulation filed in the cause in this court, that the deed of trust has been released and the indebtedness, secured by it, discharged. The transactions in question occurred between Brown, the complainant, and Robert A. McMurray, the husband and agent of Sarah McMurray.

The case is further stated by the court.

Mr. James S. Edwards, for appellants:

It is insisted as matter of law, that the plaintiff, upon his own showing, is not entitled to the relief he seeks; for the contract upon which he relies is a special one.

Haley v. Prosser, 8 Watts & S., 133; *Grant v. Strong*, 18 Wall., 628 (85 U. S., XXI., 859).

The plaintiff must have been entitled to file his lien when the contract was made. He can do nothing afterwards to alter his position.

Hoatz v. Patterson, 5 Watts & S., 537.

Mr. Edwin L. Stanton for appellee:

The complainant below having no other security, was not deprived of his lien by reason of agreeing to accept land instead of money for his material. There is no distinction in principle between an agreement to pay money or property, which can possibly affect the remedy provided.

Phil. Mech. Liens, 182; *Campbell v. Scaife*, 1 Phila., 187; *Haviland v. Pratt*, 1 Phila., 364; *Hinchman v. Lybrand*, 14 Serg. & R., 32; *Reiley v. Ward*, 4 Iowa (Greene), 21.

Mr. Justice Clifford delivered the opinion of the court:

Mechanics or other persons, who, by virtue of any contract with the owner of any building, or with the agent of such owner, have, since the 2d of February, 1859, performed labor, exceeding the value of \$20 upon such building, or have furnished materials, engine or machinery exceeding that value, for the construction or repairing of such building, shall, upon filing the notice prescribed in the 2d section of the Lien Act of that date, have a lien upon such building, and the lot of ground upon which the same is situated, for such labor done, or materials, engine or machinery furnished. 11 Stat. at. L., 376.

Building materials of great value, such as bricks and lumber, were furnished by the complainant to the first named respondent, by virt-

ue of a verbal agreement, as he alleges, between him and the husband of the respondent, acting as her agent.

Service was made and the respondent appeared, and by her answer admitted the averments of the first, second, fourth and seventh paragraphs of the bill of complaint, but denied every other material allegation which it contains.

Proofs were taken; and, the parties having been fully heard, the judge, at special term, entered a decree that the complainant recover of the respondent the sum of \$1,232.62, with interest, as therein provided; and that the described real estate, to wit: lots numbered thirty-six and thirty-seven, together with the buildings and improvements thereon, be, and hereby are, subjected to the satisfaction of the complainant's demand.

Due appeal was taken by the respondent to the General Term, where the decree of the special Term was in all things affirmed; and the respondent appealed to this court.

Two other persons were named as respondents in the bill of complaint who never filed any answer, and are not parties to the decree, for the reason that no relief is sought against them, they having been joined as respondents merely for the purpose of discovery in respect to a prior lien held on the premises by the one named as trustee, to secure a debt due to the other.

Seasonable appearance was entered by the respondent, and she filed an answer; but, the answer having been lost, it is stipulated and agreed between the parties, that the answer, as before stated, admitted all the averments of the first, second, fourth and seventh paragraphs of the bill of complaint, and that it denied every other allegation of the complainant.

Lumber and bricks were furnished by the complainant for two houses; and the evidence shows that the respondent owned both lots on which the houses were being constructed, and that she was represented throughout the transaction by her husband, who acted as her agent in constructing the houses. Nothing further need be remarked respecting the deed of trust of prior date, as it is admitted by stipulation that the deed is canceled, and that the debt secured by it is discharged.

Due notice of the intention of the complainant to hold a lien upon the property, as required by the Act of Congress, is admitted by the answer; nor is it necessary to discuss the question as to the agency of her husband in the transaction, as that also is admitted by the respondent. What the respondent denies is, that either she, or her agent in her behalf, ever made any such contract with the complainant as that set forth in the bill of complaint, or that the complainant ever furnished and delivered to her or her agent the building materials specified in the bill of particulars annexed to the bill of complaint, or that the materials were ever used by her or by her authority in the construction of the said houses.

Lots thirty-six and thirty seven belonged to the respondent, and the proof is that they adjoin each other. Prior to the alleged agreement with the complainant, the respondent entered into a contract with another party to build a two-story brick house for her on the lot first

named, the contractor agreeing to build the house, and furnish, at his own proper cost and expense, all the materials necessary to complete the same in a workmanlike manner; for which the respondent agreed to pay to the contractor the sum of \$1,000, and at the same time to convey to him lot thirty-seven, and to pay the balance, amounting to \$1,200, in notes of \$50 each, payable monthly, at eight per cent. interest, to be secured by a deed of trust on lot thirty-six, and the house to be built by the contractor, subject to a prior deed of trust on the same lot. By the record, it appears that the contract, though it bears date the 6th of June, 1871, was not actually executed until about the middle of July following, and that the contractor failed to fulfill the stipulations of the written contract.

Perkins, the contractor, was without means or credit, and possessed no capital whatever, except his skill as a builder; and the husband of the respondent, though he controlled the real estate standing in the name of his wife, was without any ready means at his command; consequently, the materials for completing the house could not be obtained except by exchanging some of the real estate for the same. Detailed account is given, in the testimony, of the measures adopted by the parties to effect such an exchange of real estate for building materials; but it must suffice to say that all of the negotiations failed.

All of these attempts to procure building materials by exchanging real estate for the same took place before the contract for building the house was signed; and, at the close of those attempts, an interview occurred between the contractor under the written agreement and the complainant, when the latter informed the former that he would furnish lumber and bricks in exchange for lot thirty-seven, computing the value of the lot at forty-five cents per foot. Within two hours after the conversation, the former contractor reported the same to the husband of the respondent, and told him to have the deed of the lot made directly to the complainant, and proposed, at the same time, to divide between them the five cents per foot advance in price which the seller would receive, beyond the consideration promised by the former contractor.

Abundant evidence is given to show that the offer of the complainant to take conveyance of the lot, and furnish the building materials as required, was accepted by the husband of the respondent; and that he, the agent, agreed that the lot should be conveyed to the complainant as proposed.

Pursuant to that arrangement, which appears to have been fairly and understandingly made, the complainant continued to deliver the required building materials; and the conduct of the husband of the respondent throughout the whole period the materials were furnished and delivered shows, to the entire satisfaction of the court, that the materials were furnished and delivered in pursuance of that understanding, and that he knew that the owner and furnisher of the same was parting with his property in the just and full expectation that the whole passed to the benefit of his wife under that arrangement. Evidence to that effect is found in the testimony of several witnesses; and it is not going too far to say that there is nothing in the

record worthy of credit to contradict that theory.

Part of the building materials furnished by the complainant before he made his contract with the respondent were used by the first contractor in the erection of a house on lot thirty-seven, which he designed for himself; but the title and ownership of that lot, as well as lot thirty-six, were in the respondent; and on the first of November, 1871, she took actual possession of the lot and the unfinished structure thereon which had been commenced by the former contractor, and ever after continued in the possession and control both of the lot and the building.

Nothing further was ever done by the contractor to complete these houses, and the record shows that the same were completed by another contractor employed by the same agent of the respondent. All of the materials for that purpose were furnished by the complainant; and the record also shows that he furnished all the materials used in constructing and completing both houses, except a small part of the bricks, worth perhaps \$100, which were purchased by the managing agent of the respondent.

Attempt is made by the respondent to controvert the proposition that her agent ever contracted with the complainant to furnish the building materials in question, and to take the conveyance of lot thirty-seven in payment for the same; but the evidence is so full and satisfactory to that effect, that it is not deemed necessary to add anything to what has already been remarked upon the subject; nor is it of any importance that she had previously agreed to convey the lot to her former contractor, in case he completed the house for her on lot thirty-six as he had failed to fulfill the contract, and she had dispossessed him of the premises and of the partly erected house which he had commenced.

Materials for that purpose to a considerable amount had been furnished by the complainant during the progress of the work, while it was under the superintendence of the former contractor; but, inasmuch as the title of both lots was all the time in the respondent, and she had lawfully resumed the possession of lot thirty-seven on account of the failure of the contractor to complete the building on the other lot within the prescribed time, it was entirely competent for the respondent to make the new contract with the complainant, which it is proved she did make through her agent; and, having made the same, she is bound by its terms and conditions just the same as if it had been in writing.

Suppose the facts are so; still it is insisted by the respondent, as matter of law, that the complainant is not entitled to the relief he seeks, for the reason that the contract set up by him is a special contract. The theory is, that the materials having been furnished upon the verbal contract set out in the bill of complaint, that he, the complainant, should furnish the materials, and that she, the respondent, should convey lot thirty-seven to him in payment for the same, that that contract creates no lien, as the materials were furnished solely upon the faith of the special agreement; but the record shows that her agent who made the contract persuaded the complainant to wait for the conveyance until all the materials had been furnished, and that he, the agent, then refused to make the

conveyance. Instead of doing as he agreed, having received an offer of fifteen cents per foot for the lot, more than the complainant was to allow, he, the agent, promised to pay the complainant the money for the materials, but failed to make good his promise in that regard.

Both houses were completed; and the proof is, that the complainant furnished all the lumber and nearly all the bricks for the purpose, and that he has received no payment for the materials. On the other hand, it appears that the respondent has sold one of the houses for \$6,000, and that she and her husband were living in the other.

Other defenses failing, her proposition now is, that, where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract alone for his security, and that he cannot resort to the remedy which the lien law provides. Support to that proposition cannot be derived from anything contained in the Act of Congress passed to enforce mechanics' liens, unless the words of the 1st section of the Act are shorn of their usual and ordinary import and signification.

Persons who perform labor upon, or furnish materials, etc., for, the construction or repairing of a building, by virtue of any contract with the owner of the same, or his agent, have a right to the benefit of the lien if he files the notice prescribed by the 2d section of the Act. Certainly the words "any contract" are sufficiently comprehensive to include special contracts as well as contracts which arise by implication, unless the material man is secured by a deed of trust or mortgage, or in some other form of security repugnant to the theory that he ever intended "to hold a lien under the mechanics' lien law."

Special reference is made by the respondent to two decided cases in Pennsylvania in support of her proposition that the lien law does not extend to special contracts. *Hoatz v. Patterson*, 5 Watts & S., 538; *Haley v. Prosser*, 8 Watts & S., 188. Unexplained, it may be admitted that those cases do afford support to the proposition that the state lien law to which they refer did not extend to the debt of a material man, arising from the sale and delivery of building materials, if furnished under a special contract; but those decisions were never satisfactory to the legal profession of that State, and it is believed are not regarded as safe precedents even in the jurisdiction where they were made. Instead of that, the Legislature of the State, on the 16th of April, 1860, passed a declaratory law, which enacts that the true intent and meaning of the provisions of the prior Act extend to and embrace claims for labor done and materials furnished and used in erecting any house or other building which may have been or shall be erected under or in pursuance of any contract or agreement for the erection of the same, and that the provisions of the former "Act shall be so construed." Since that time, it has been held by the courts of that State to the effect that special contracts, as well as implied, are within the true intent and meaning of the original lien law of the State. *Russell v. Bell*, 44 Pa., 47-54; *Reiley v. Ward*, 4 Greene (Iowa), 21.

Cases may arise, undoubtedly, where the

rights and responsibilities of the parties are so completely defined by the contract, that neither party is at liberty to claim anything beyond the terms of the contract, if the contract is in all respects fulfilled. Consequently, lien laws do not in general create a lien in favor of a material man who has accepted in full a different security at the time the contract or agreement was made. Examples of the kind, such as a trust-deed or mortgage, may be mentioned, which are regarded as a species of security inconsistent with the idea of a mechanics' lien upon the same land for the same debt. *Grant v. Strong*, 18 Wall., 628 [85 U. S., XXI., 859]; *Phil. Lien*, sec. 117.

Such a security is regarded as inconsistent with the intent of the parties that a mechanics' lien should be claimed by the party furnishing building materials, as the owner may obligate himself to pay in money, land or any specific article of property; but, if he does not fulfill his contract by paying in the manner stipulated, the mechanic is entitled to his lien. *Reiley v. Ward* [*supra*].

If the labor has been performed or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third persons intervene before he gives the required notice.

Contracts of a special character, such as to give a mortgage to the laborer or mechanic, if duly executed under circumstances showing that the claim to a lien was not intended by the parties, may defeat such a claim; but a mere promise to give such a security, if subsequently broken, will not impair such a right if the requisite notice is given before any right of a third party, as by attachment or conveyance, has become vested in the premises. Laches in that behalf may impair such a right, and it is one which the claimant may waive. *Phil. Lien*, secs. 117, 272.

Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis, that, if the stipulated labor is performed or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time. 11 Stat. at L., 376; *Phill. Mech. Liens*, sec. 118.

Viewed in any light, it is clear that there is no error in the record.

Decree affirmed.

SAMUEL BLACK ET AL., *Appls.*
v.

UNITED STATES.

(See S. C., 1 Otto, 267-270.)

Government contract, construction of.

Where government contractors bound themselves to transport supplies from any posts or stations that might be established within the district described in their agreement, and from one point to

another in the route, held, that although Fort Phil. Kearney was a military post within the district at which the contractors could be required to receive supplies for transportation, they were not, when required to transport supplies from that post, entitled to compensation for the distance their teams traveled unloaded to reach that place, but only for the distance the supplies were carried.

[No. 496.]

Submitted Dec. 8, 1875. Decided Jan. 10, 1876.

A PPEAL from the Court of Claims.

The case is stated by the court.

Messrs. C. F. Peck, T. J. Durant and H. Spalding, for appellants.

Mr. Edwin B. Smith, Asst. Atty-Gen., for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

The material provisions of the contract upon which this suit is brought are as follows:

"Article I. That the said Black, Kitchen & Martin shall receive at any time, in any of the months from April 1, 1868, to March 31, 1869, inclusive, from the officers or agents of the Q. M. Department at Fort D. A. Russell, in the Territory of Dakota, or such point as may be determined upon during the year on the Omaha branch of the Union P. R. R., west of Fort D. A. Russell, or at Fort Laramie, Dakota Territory, all such military stores and supplies as may be offered or turned over to them for transportation, in good order and condition, by the officer or agent of the Q. M. Department, or at any or all of the above points or places, and transport the same with dispatch, and deliver them in like good order and condition to the officer or agent of the Q. M. Department on duty, or designated to receive them at any of the posts or depots, that are now or may be established in the State of Nebraska, west of longitude 102°; in the Territory of Montana, south of latitude 47°; in the Territory of Dakota, west of longitude 104°; in the Territory of Idaho, east of longitude 114°; and in the Territories of Utah and Colorado, north of latitude 40°, including, if necessary, Denver City; or at any other points or posts on the route, agreeably to the instructions they may receive from the officer or other authorized agent of the Q. M. Department, charged with the duty of forwarding the stores and supplies at Fort D. A. Russell or other place of departure; and for the faithful performance of such service they shall be paid in the manner hereinafter provided for in art. XVII. of this agreement, and at the rates specified and shown in the tabular statement hereto annexed and signed by the parties to this agreement, which statement is considered as part hereof."

"Art. II. That the said Black, Kitchen & Martin agree and bind themselves, their heirs, executors and administrators, to transport under this agreement, from the posts, depots or stations named in art. I., or from and to any other posts, depots or stations that may be established within the district described in said article, any number of pounds of military stores and supplies, from and between 100,000 pounds and 25,000,000 of pounds in the aggregate."

"Art. XIV. It is understood that if at any time stores or supplies are required to be transported back to any point on the road, or to any of the original points of departure, or from one point to another within the route, they shall be

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carried upon the same terms and conditions as herein provided."

"Art. XVII. For and in consideration of the faithful performance of the stipulations of this agreement, the said Black, Kitchen & Martin shall be paid at the office of the Quartermaster's Department at Omaha, Nebraska, in the legal currency of the United States, according to the distance supplies are transported, and agreeably to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement."

The transportation for which compensation is now asked was from one point to another within the route; and full payment has been made therefor according to the distance the supplies were transported, and agreeably to the rates specified in the tabular statement.

It is claimed, however, that as Fort Phil. Kearney, the point at which the supplies were received for transportation, was within the route, the contractors are entitled to compensation for the distance their teams traveled unloaded to reach that place, as well as for the distance the supplies were carried. This claim is based, not upon any express provision in the contract requiring or even permitting such payment, but because, as is insisted, the service rendered was not included in the obligations of the contract. The argument is, that the places named in article I. are the only places at which the contractors were bound to receive the supplies to be transported. But this excludes from consideration article II. and article XIV., by which the contractors bound themselves not only to transport under the agreement from the posts, depots and stations named in article I., but also from and to any other posts, depots or stations that might be established within the district described in said article, and from one point to another within the route. For the purposes of construction, we must look to the whole instrument. The intention of the parties is to be ascertained by an examination of all they have said in their agreement, and not of a part only.

In *Caldwell's* case, 19 Wall., 264 [86 U. S., XXII., 114], we decided that the terms "posts, depots or stations," as used in articles I. and II. of his contract, in the presence of actual war, and in reference to military stores, included military posts and stations alone. Consequently, it was held that Caldwell could not claim the right of transporting supplies from railroad stations within the district, which were not at the same time military posts, stations or depots. In the present case, the starting-point was Fort Phil. Kearney, a military post, and, consequently, a point within the district at which the contractor could, under the ruling in *Caldwell's* case, be required to receive stores and supplies for transportation. It is a noticeable fact, though perhaps under the circumstances of this case unimportant, that the provision for transportation from one point to another within the route which is found in article XIV. of the contract in this case, is not to be found in Caldwell's contract. His contract was for the year 1866. This is for 1868-9. It is not impossible that the claim made by him may have suggested the necessity for this change in the terms of such agreements. In Caldwell's contract, too, article I. provided that stores

should be received for transportation at any points or places at which posts or depots shall be established. Here the same article provided that they should be received at such point as may be determined upon during the year, on the Omaha branch, etc., omitting the further provision, that it should be a post or depot.

We are clearly of the opinion that the services rendered by these appellants were within the requirements of their contract, and that the only compensation they are entitled to is for the distance the articles were actually carried, and agreeably to the rates specified.

The judgment is affirmed.

UNITED STATES, *Appt.*,

v.

ARCHIBALD MCKEE ET AL.

(See S. C., 1 Otto, 442-452.)

Interest, when allowable on claims.

1. When the United States assumes a claim against a State, it should be paid in full, interest as well as principal, as the State would have paid it.

2. Where a general Act directs commissioners to allow interest on claims, if a claim be referred to the Court of Claims by a special Act, directing that court to be governed by the rules adopted in like cases, that court may allow interest.

[No. 588.]

Submitted Dec. 17, 1875. Decided Jan. 10, 1876.

A PPEAL from the Court of Claims.

The case is stated by the court.

Mr. S. F. Phillips, *Solicitor-Gen.*, for the appellant.

Mr. W. Penn Clarke, for appellees:

As the testimony in the case establishes, almost beyond controversy, that Vigo received from Colonel Clarke, for supplies furnished or moneys advanced, for the use of his troops, this draft for \$8,716, and that the same has never been paid either by the State of Virginia or the United States, the only question seems to be: what are these claimants, as the representatives of Colonel Vigo, entitled to recover? And the answer naturally is: the amount of the draft, with legal interest from its date up to the time of payment. This is the rule of damages in all such cases, and is the rule established by Congress itself, with reference to these Revolutionary claims. In the Act of 1787, heretofore cited, Congress provided that on the accounts of the States for advances and disbursements, made for the use of the United States, "Interest shall be allowed at the rate of six per cent. per annum," agreeably to the resolves of Congress (1 L. of U. S., 663, ed. 1815); and the 5th section of the Act of 1790, in like manner, provided that the balances struck between the States and the United States should also bear interest. 2 L. of U. S., 174, ed. 1815. And this rule has been consistently adhered to ever since, in all cases of individual Revolutionary claims allowed by Congress. The statutes are full of such cases.

2 L. of U. S., 327, ed. 1815; 2 L. of U. S., 411, ed. 1815; 2 L. of U. S., 479, ed. 1815; 3 L. of U. S., 25, 518, 566, ed. 1815; 4 L. of U. S., 99, 100, 264, 367, 461, 505, 683, ed. 1815; 6 L. of U. S., 97, 287, 510, 537; 7 L. of U. S., 88, 84,

195, 244, 371, 414, 705, 599; 8 L. of U. S., 60, 150, 386, 376, 434, 557, 651, 652, 728, 734, 718, 775, 845-847; 9 L. of U. S., 48, 61, 77, 93, 96, 97; 8 L. of U. S., 734, 152, 163, 521.

These citations from the statutes, commencing with the very organization of the Government and running up to the year 1857, establish the proposition I have heretofore stated, that on claims for money advanced, supplies furnished and services rendered to the Revolutionary cause, legal interest was allowed from the date the funds were advanced, the supplies furnished or the services rendered. This has been the uniform policy of the Government, as defined by Congress and carried into effect by the executive departments. And this policy has been steadily adhered to by later Congresses. 6 Stat. at L., 46.

Mr. Justice Miller delivered the opinion of the court:

The claim of the State of Virginia to dominion over that region of country called the Territory Northwest of the Ohio River, which is now filled with a population of many millions and divided into five States of the Union, was not undisputed in the days when that State was a Province of Great Britain. The French had numerous settlements there; and the Government of Great Britain claimed, both by the acquisition of Canada and by settlement, a large part of that loosely defined country. They had their military posts there, as well as peaceful villages. The Indians also denied all right of the Colony of Virginia to rule over them; and some of the most warlike tribes of that race were known to occupy, with claim of exclusive right, the largest part of the country.

During the Revolutionary War, Gen. George Rogers Clarke, acting under a commission from the State of Virginia, fitted out a warlike expedition, and starting from the falls of the Ohio, now called Louisville, made his appearance suddenly before the military post of Kaskaskia, then held by the British, and captured it and several other posts; and, in the course of one of the most romantic campaigns which the history of that region down to this day affords, effectually settled the right of Virginia to supremacy in that quarter.

General Clarke was not very vigorously supported by Virginia in this enterprise; for it occurred during the war of the Revolution, and that Commonwealth, as she now called herself, was engaged in more pressing affairs. It seems, however, that the State had in New Orleans an agent on whom Clarke drew several drafts for funds to aid him in the matter, most of which were paid.

In the year 1778 he drew one of these drafts in favor of Francis Vigo for \$8,616, which was not paid for want of funds. This draft was given for supplies furnished to Clarke's regiment, and has never yet been paid. It does not appear that the State of Virginia ever denied the justice of this debt; but by the finding of the Court of Claims, from which this record comes to us on appeal, it does appear that an officer of that State, called the Commissioner of Revolutionary Claims, examined into this one in the year 1835, and adjusted it, including interest, at \$32,654.85.

In the course of the negotiation for the re-

linquishment of title by the States to their outlying territories, one of the Resolutions passed by the Continental Congress, Oct. 16, 1780, 6 Jour. of Cong., 213, was, that, when so ceded, "The necessary and reasonable expenses which any particular State shall have incurred since the commencement of the present war, in subduing any British post, or in maintaining forts or garrisons within and for the defense, or in acquiring any part, of the territory that may be ceded or relinquished to the United States, shall be re-imbursed."

The debt represented by this draft comes directly within the language of this Resolution, which was repeated by the Virginia Legislature in the Act of cession.

But by the Act of August 5, 1790, 1 Stat. at L., 178, by which Congress constituted a Board of Commissioners to adjust all claims of the several States against the United States, there was a provision that no claim of a citizen of a State should be admitted as a claim against the United States which had not been allowed by the State before the 24th day of September, 1788. As the claim of Vigo, on account of this draft, had not then been allowed by the State of Virginia, this proviso has remained as a perpetual bar to its payment or allowance by those commissioners, or by any other officer of the Government.

Congress, however, by many private Acts, has authorized the payment of other claims similarly barred. This claim has been constantly pressed upon the attention of Congress by the heirs of Vigo; until finally the case was, by the Act of June 8, 1872, referred to the Court of Claims in the following language:

"The claim of the heirs and legal representatives of Colonel Francis Vigo, deceased, late of Terre Haute, Ind., for money and supplies furnished the troops under command of General George Rogers Clarke in the year 1778, during the Revolutionary War, be, and the same hereby is referred, along with all the papers and official documents belonging thereto, to the Court of Claims, with full jurisdiction to adjust and settle the same: and, in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases, giving proper consideration to official Acts, if any have heretofore been had in connection with this claim, and without regard to the Statutes of Limitations."

We entertain no doubt that the claim was a just claim in the hands of Vigo against the State of Virginia, and that, under the Resolutions of the Congress of the United States and the State of Virginia, it belonged to that class of claims which Congress had assumed on receiving from that State the cession of the Territory northwest of the Ohio. The wisdom of the Act of Congress of 1790, in fixing a date after which the States could not make allowances of claims which should bind the United States, is apparent; and nothing could be more just or honorable than that Congress, when appealed to for a relaxation of this salutary general rule of exclusion in favor of the private citizen who had a meritorious case, should grant relief. It seems clear to us, that, in the Act of 1872, Congress did mean to remove this bar of the lapse of time, and to authorize the Court of Claims,

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if they found the claim to be a just one, to settle and allow it.

That the allowance of the principal sum was right, we think is beyond question; but the allowance of interest admits of discussion.

It has been the general rule of the officers of government, in adjusting and allowing unliquidated and disputed claims against the United States, to refuse to give interest. That this rule is sometimes at variance with that which governs the acts of private citizens in a court of justice would not authorize us to depart from it in this case. The rule, however, is not uniform; and especially is it not so in regard to claims allowed by special Acts of Congress, or referred by such Acts to some department or officer for settlement.

The counsel for claimant has, in a careful brief, collected, with much labor, numerous cases in which interest has been allowed by Congress in the adjustment of disputed claims. The 5th section of the Act of August 5, 1790, already referred to, directed the commissioners, who under that Act were to settle the claims of the States against the General Government, to allow interest; and, but for the bar of time in that Act, this case would have come under that statute. The Act under which the Court of Claims took jurisdiction of this case directed it to be "governed by the rules and regulations heretofore adopted by the United States in settlement of like cases." This is a like case to those in which interest was to be allowed by the Act of 1790.

The bill of exchange drawn by Clarke in favor of Vigo is an instrument, which, by the commercial usage of all nations, bears interest after it becomes due. It also evidences the claim as a liquidated sum. There has never been any dispute about the amount due, if the claim was legal; and though the United States is not directly bound by the instrument, yet, if they choose to remove the bar of time, as the Act of 1872 does in express terms, and it is found that the claim is one which the Government has by law agreed to pay, we see no reason why it should not be paid in full, with all its legal incidents, as the State of Virginia should and would have paid it, had not the liability been assumed by the United States when she received the cession of that immense country—a consideration ample enough for this and all other obligations she assumed in that contract.

The judgment of the Court of Claims is affirmed.

Mr. Justice Clifford, dissenting:

I dissent from so much of the opinion of the court as allows interest to the claimant. Unless where the contract is express to that effect, the United States are not liable to pay interest. Interest should never be allowed on old claims, where payment has been deferred because the accounting officers of the Treasury were of the opinion that further legislation was necessary to authorize their allowance, unless the new law clearly provides for the payment of interest as well as principal.

Mr. Justice Hunt concurs in this dissent.

Mr. Justice Davis did not sit on the argument in this cause and took no part in its decision.

CHARLES WATTS, *Plff. in Err.*,

v.

TERRITORY OF WASHINGTON.

(See S. C., 1 Otto, 580.)

Jurisdiction of territorial judgments.

This court cannot review the final judgments of the Supreme Court of the Territory of Washington in criminal cases, unless the Constitution or a statute or treaty of the United States was drawn in question therein.

[No. 89.]

Argued Dec. 15, 1875. Decided Jan. 10, 1876.

IN ERROR to the Supreme Court of the Territory of Washington.

The record in this case, which is brought up by a writ of error to the Supreme Court of Washington Territory, shows the trial, conviction and sentence of the plaintiff in error for murder, alleged to have been committed June 17, 1869, on the Island of San Juan, which is included within the limits of Whatcom County, Washington Ty.

On behalf of the plaintiff in error it was argued that neither the district court in which the case was tried, nor the Supreme Court of the Territory by which the case was reviewed, had any jurisdiction of the offense described in the indictment:

"Because, at the time of the alleged commission of the offense, the said Island of San Juan was in dispute, and its sovereignty was conceded by the Government of the United States to be in abeyance, and was not absolutely then vested in the United States; and because the right of a nation to extend her laws, either civil or criminal, over any territory only grows out of complete sovereignty and right of eminent domain; and because, more particularly, San Juan Island, at the time of the alleged commission of the said offense, was, by a Treaty of the United States, on a truce entered into between General Winfield Scott, Commander of the American forces, and Governor Douglass, Commander of the English forces (at the time under arms and by the bayonet at the time about to dispute the right of sovereignty and eminent domain of the Island of San Juan) under the joint military occupation of the authorities of the two governments; and because, by the terms and stipulations made for said joint military occupation, jurisdiction of any character over the same, for the time being, was especially forbidden and interdicted from being exercised by any of the courts of Washington Territory; and because the exercise of jurisdiction by said court or courts, or either of them, in the case at bar, is in direct contravention of the convention and truce between the United States and Great Britain, under which the Island of San Juan was occupied at the time of the alleged commission of the offense charged in the indictment and is, therefore, contrary to and against the laws of the land."

After the writ of error was sued out, the Emperor of Germany, to whom was referred the question at issue between the Governments of the United States and of Her Britannic Majesty, as to the northwestern boundary line, in pursuance of article XXXVI. of the Treaty of Washington, decreed his award.

The Island of San Juan is within the boundaries of the United States as thus defined.

Mr. Nath'l Wilson, for plaintiff in error.
Mr. Edwin B. Smith, Asst. Atty-Gen., for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This court can only review the final judgments of the Supreme Court of the Territory of Washington in criminal cases, when the Constitution or a statute or treaty of the United States is drawn in question. R. S., sec. 702.

This is a criminal case, but the record does not present for our consideration any question of which we can take jurisdiction. It nowhere appears that the Constitution or any statute or treaty of the United States is in any manner drawn in question.

Writ dismissed for want of jurisdiction.

THE TWIN-LICK OIL COMPANY OF
WEST VIRGINIA, *Appt.*,

v.

WILLIAM MARBURY.

(See S. C., 1 Otto, 587-594.)

Director of corporation—loan by director to corporation, when valid—purchase at mortgage sale by.

1. A director of a joint-stock corporation occupies a fiduciary relation, where his dealings with the subject-matter of his trust or agency and with the corporation are viewed with jealousy by the courts, and they may be set aside on slight ground.

2. But one director among several may loan money to the corporation when the money is needed and the transaction is open and otherwise free from blame, and he may buy at a sale under a mortgage given by it to him to secure the money loaned, if the sale was a fair one.

3. A bill, to avoid such a sale, must be brought within a reasonable time.

[No. 69.]

Argued Dec. 9, 10, 1875. Decided Jan. 10, 1876.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. J. M. Carlisle, J. D. McPherson and Chas. Beaton, for appellant:

The defendant, then, in this case, as one of the complainants' directors, seeking to take advantage of his own gross negligence and mismanagement of the Company's affairs, sees the embarrassed state of the Company, the necessary result of his own mismanagement, and after a full investigation, as appears from his own testimony, decides that he will be abundantly secured. Then, taking a further advantage of the embarrassed condition of the Company in not disclosing what he ought to have known, whether he did or not, and what the law will impute he did know, has the property struck off to him through the intervention of a third party, whom he has employed and against whom he pretends to be bidding, at a sale which he has principally conducted.

It is respectfully submitted, that, apart from all the special facts of this case adduced in fa-

NOTE.—Fiduciary position of directors; their contracts and dealings with corporation. See note to *Koehler v. Hubby*, 67 U. S., XVII., 380.

vor of complainant's relief, this is a case in which a director has purchased his Company's property, and the law will impute fraud and compel restitution.

Drury v. Cross, 7 Wall., 299 (74 U. S., XIX., 40); *York & Mid. R. R. Co. v. Hudson*, 16 Beav., 485; *Luxembourg R. R. Co. v. Magnay*, 25 Beav., 586; *Aberdeen R. Co. v. Blaikie*, 1 McQueen, 461; 32 L. J. Ch., 44; *Ex parte Hill*, 1 Mont., 260; *Kerr, Fraud*, 158; *Ex parte James*, 8 Ves., 337; *Bowes v. Toronto*, 11 Moore, P. C., 463; *Torrey v. Bk.*, 9 Paige, 663; *Slade v. Van Vechten*, 11 Paige, 21; *Davous v. Fanning*, 2 Johns. Ch., 260; *Coal and Iron Co. v. Sherman*, 30 Barb., 558; *LeRoy v. Rogers*, 8 Paige, 237; 4 Curren, 717; *DeCaters v. DeChaumont*, 8 Paige, 178; *Iddings v. Bruen*, 4 Sandf. Ch., 239; *Pickett v. School District*, 25 Wis., 551; *Steam Co. v. Coal and Iron Co.*, 16 Md., 456; *Coal and Iron Co. v. Sherman*, 20 Md., 118; *Butts v. Wood*, 37 N. Y., 317.

It is the duty of a trustee to get all the information possible, for the benefit of the *cestui que trust*.

Ex parte James, 8 Ves., 348; *Gibson v. Jeyes*, 6 Ves., 280; *Harris v. Tremenhoe*, 15 Ves., 40; *Huguenin v. Baseley*, 14 Ves., 299; see, also, *Farnam v. Brooks*, 9 Pick., 212, 234.

"The confirmation of a sale must be the joint act of all; a majority cannot bind a minority; the *cestui que trust*, acting *sui juris*, must not only be acquainted with all the facts, but apprised of the law of how those facts would be dealt with if brought before a court of equity; they must know they are confirming an impeachable transaction."

1 Dart, Vend., 43; *Lewis, Trusts*, 615, 664; 1 White & T. L. Eq. Cas., 186; 16 Md., 509 *supra*; 20 Md., 117 *supra*, 184; *Davous v. Fanning*, 2 Johns. Ch., 264; *Cropey v. McKinney*, 30 Barb., 47; *Ex parte Hughes*, 6 Ves., 622; *Ex parte Lacey*, 6 Ves., 628; *Ex parte James*, 8 Ves., 353.

The doctrine that a party will not be allowed to purchase and hold property for his own use and benefit, to which he stands in a fiduciary relation, if contested by the *cestui que trust*, is inflexible without regard to the consideration paid or the honesty of the intent. *Chorpenning's Appeal*, 32 Pa., 315; *Frost v. Coal Co.*, 24 How., 278 (65 U. S., XVI., 637); *U. S. v. Williams*, 5 Cranch, C. C., 62; *Ang. & Ames, Corp.*, sec. 774, and cases cited.

Messrs. W. D. Davidge, W. S. Cox and Wm. Marbury, for appellee:

The complainant, then, has nothing to rely upon, except the supposed rule of equity, which, on the grounds of policy, would forbid the director of a corporation from purchasing at a sale of its property.

But a mere shareholder is under no such disability, and when a director becomes a creditor, he is, as to his debt, in as good a position as any other creditor, whether a mere stockholder or a stranger. Otherwise, directors who are most interested in sustaining the corporation could not lend it money in extremity, without greater risk of losing it than a stranger.

See, *Ang. & Ames, Corp.*, sec. 233, and cases cited; *Stratton v. Allen*, 16 N. J. Eq., 229; *Gordon v. Preston*, 1 Watts, 385; *R. R. Co. v. Claphorn*, 1 Speers, Eq., 546; *Buell v. Buckingham*, 16 Ia., 284; *St. Louis v. Alexander*, 23

Mo., 483, 528; *Merrick v. Coal Co.*, 61 Ill., 478.

The cases which assert a disqualification of the director to purchase, are either cases in which he was not a creditor, or cases of express fraud in which he became a creditor for the express object of forcing sales of property at a sacrifice, and becoming the owner for his own gain.

On the facts it will be maintained that, if the complainant ever had any claim to relief, it is now barred by acquiescence and laches.

Kerr, Fraud & M. (Am. ed.), 201; *Vigers v. Pike*, 8 Cl. & F., Am. ed., 650; *Wentworth v. Lloyd*, 32 Beav., 467; *Hollansbee v. Kilbreth*, 17 Ill., 522; *Wade v. Pettibone*, 11 Ohio, 57; *Cowell v. Watts*, 19 L. J. Ch., 455; *Banks v. Judah*, 8 Conn., 145.

The nature of the property involved in this case is peculiar. It is purely speculative, subject to constant risks and fluctuations, and specially demanding diligence in the assertion of any claims upon it.

All this is recognized in the legislation of West Virginia.

The court fully recognizes the distinction between this kind of cases and others.

Clegg v. Edmondson, 8 De Gex, McN. & G., 787; *Walford v. Adie*, 5 Hare, 122; *Prendergast v. Turton*, 1 You. & C., 98; *Norway v. Rowe*, 19 Ves., 144; *Ernest v. Vician*, 33 L. J. Ch., 515; *Ashurst's Appeal*, 60 Pa., 290.

Mr. Justice Miller delivered the opinion of the court:

The appellant here, complainant below, was a Corporation organized under the laws of West Virginia, engaged in the business of raising and selling petroleum. It became very much embarrassed in the early part of 1867, and borrowed from the defendant the sum of \$2,000, for which a note was given, secured by a deed of trust, conveying all the property, rights and franchises of the Corporation to William Thomas to secure the payment of said note, with the usual power of sale in default of payment. The property was sold under the deed of trust; was bought in by defendant's agent for his benefit, and conveyed to him in the summer of the same year. The defendant was, at the time of these transactions, a stockholder and director in the Company; and the bill in this case was filed in April, 1871, four years after, to have a decree that defendant holds as trustee for complainant, and for an accounting as to the time he had control of the property. It charges that defendant has abused his trust relation to the Company, to take advantage of its difficulties, and buy in at a sacrifice its valuable property and franchises; that, concealing his knowledge that the lease of the ground on which the Company operated included a well, working profitably, and by promises to individual shareholders that he would purchase in the property for the joint benefit of the whole, he obtained an unjust advantage, and in other ways violated his duty as an officer charged with a fiduciary relation to the Company. As to all this, which is denied in the answer, and as to which much testimony is taken, it is sufficient to say that we are satisfied that the defendant loaned the money to the Corporation in good faith, and honestly to assist it in its business in an hour of extreme em-

barrassment, and took just such security as any other man would have taken; that when his money became due, and there was no apparent probability of the Company paying it at any time, the property was sold by the trustee, and bought in by defendant at a fair and open sale, and at a reasonable price; that, in short, there was neither actual fraud nor oppression; no advantage was taken of defendant's position as director, or of any matter known to him at the time of the sale, affecting the value of the property, which was not as well known to others interested as it was to himself; and that the sale and purchase was the only mode left to defendant to make his money.

The first question which arises in this state of the facts is, whether defendant's purchase was absolutely void.

That a director of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. *Koehler v. Iron Co.*, 2 Black, 715 [67 U. S., XVII., 389]; *Drury v. Cross*, 7 Wall., 299 [74 U. S., XIX., 40]; *R. R. Co. v. Magnay*, 25 Beav., 586; *Cumberland Co. v. Sherman*, 30 Barb., 553; *Hoffman S. Coal Co. v. Cumberland Co.*, 16 Md., 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say, this is the general rule; for there may be cases where such contracts would be void *ab initio*; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But even here, acts which amount to a ratification by the principal may validate the sale.

The present case is not one of that class. While it is true that the defendant, as a director of the Corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the Corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the Corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given.

There are, in such a transaction, three distinct parties whose interest is affected by it, namely: the lender, the Corporation and the stockholders of the Corporation.

The directors are the officers or agents of the Corporation, and represent the interests of that abstract legal entity, and of those who own the shares of its stock. One of the objects of creating a corporation by law is to enable it to make contracts; and these contracts may be made

with its stockholders as well as with others. In some classes of corporations, as in mutual insurance companies, the main object of the Act of incorporation is to enable the company to make contracts with its stockholders, or with persons who become stockholders by the very act of making the contract of insurance. It is very true, that as a stockholder, in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid; and we entertain no doubt that the defendant in this case could make a loan of money to the Company; and as we have already said that the evidence shows it to have been an honest transaction for the benefit of the Corporation and its shareholders, both in the rate of interest and in the security taken, we think it was valid originally, whether liable to be avoided afterwards by the Company or not.

If it be conceded that the contract by which the defendant became the creditor of the Company was valid, we see no principle on which the subsequent purchase under the deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted; and who in this respect was the trustee of the Corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money. We think the sale was a fair one. The Company was hopelessly involved, beside the debt to defendant. The well was exhausted to all appearance. The machinery was of little use for any other purpose, and would not pay transportation. Most of the stockholders who now promote this suit refused to pay assessments on their shares to aid the Company. Nothing was left to the defendant but to buy it in, as no one would bid the amount of his debt.

The next question to be decided is, whether.

under the circumstances of this case, the complainant had a right to avoid this sale at the time this suit was brought.

The bill alleges, that, both prior to the sale and since, the defendant made various declarations to other stockholders to the effect that he only designed to purchase the property for the benefit of all or a part of the stockholders; and there is some testimony to show that, after the sale, he did propose that if his debt was paid by the Company or the shareholders, he would relinquish his purchase.

But we need not decide whether any of these declarations raised a legal obligation to do so or not; nor whether, without such declarations, the sale and deed were voidable at the election of the complainant—a proposition which is entitled to more consideration, resting solely on the fiduciary relations of the defendant to the plaintiffs, than on the evidence in this case of the declarations alluded to.

We need not decide either of these propositions, because plaintiff comes too late with the offer to avoid the sale.

The doctrine is well settled, that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years as applied to every case, like the Statute of Limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale and of the facts which render it voidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised.

In fixing this period in any particular case, we are but little aided by the analogies of the Statutes of Limitation; while, though not falling exactly within the rule as to time for rescinding, or offering to rescind, a contract by one of the parties to it for actual fraud, the analogies are so strong as to give to this latter great force in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his right to rescind is gone. No delay, for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it, is allowed in a court of equity.

In the recent case of *Upton v. Tribilcock* [ante, 208], it was held that the purchaser of stock in an insurance company, who had offered to rescind within two or three months because his note had been sent to a bank for collection in fraud of the agreement to the contrary, could not avail himself of that offer to let in as defense other fraudulent representations then unknown to him, when he was sued by the assignee in bankruptcy for the unpaid installments on that stock after the bankruptcy of the company.

The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with

whom that right is optional is aware of the facts which give him that option, are numerous and well collected in the brief of appellees' counsel. The more important are as follows: *Badger v. Badger*, 2 Wall., 87 [69 U. S., XVII., 836]; *Harwood v. R. R. Co.*, 17 Wall., 78 [84 U. S., XXI., 558]; *Marsh v. Whitmore*, 21 Wall., 178 [88 U. S., XXII., 482]; *Vigers v. Pike*, 8 Cl. & F., 650; *Wentworth v. Lloyd*, 82 Beav., 467; *Follansbee v. Kilbreth*, 17 Ill., 522.

The cases of *Olegg v. Edmondson*, 8 DeG., M. & G., 787; *Prendergast v. Turton*, 1 Younge & C. (Ch.), 98, while asserting the same general doctrine, have an especial bearing on this case, because they relate to mining property.

The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to day is worth nothing to-morrow; and that which would to-day sell for \$1,000 as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.

While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them.

The case before us illustrates these principles very forcibly. The officers, and probably all the stockholders, who were not numerous, knew of the sale as soon as made. As there was no actual fraud, they knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when that privilege was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid this debt.

The defendant then had a survey made of the ground leased to the Corporation, the lease being the main thing he had acquired by the sale. When the lines were extended, the lease was found to embrace a well, then profitably worked by another company. Of this piece of good luck he availed himself, and by suit and compromise he obtained possession of that well. He put more of his money into it, and changed what had been a disastrous speculation by the Company into a profitable business. With full knowledge of all these facts, the appellant took no action until this suit was brought, nearly four years after the sale; and not until all the hazard was over, and the defendant's skill, energy and money had made his purchase profitable, was any claim or assertion of right in the property made by the Corporation or by the stockholders.

We think, both on authority and principle—a principle necessary to protect those who in-

vest their capital and their labor in enterprises useful but hazardous—that we should hold that plaintiff has delayed too long.

The decree of the court below dismissing the bill is, therefore, affirmed.

Cited—96 U., 618; 109 U. S., 524; 84 N. Y., 199; 82 Hun, 382; 84 Ohio St., 463; 69 Mo., 254.

GILBERT WOODRUFF ET AL., *Plffs. in Err.*,
v.

BENJAMIN F. HOUGH ET AL.

(See S. C., 1 Otto, 596-603.)

*Sub contractor, when bound by stipulation—
charge to jury—when sufficient.*

1. A sub-contractor is not necessarily bound by a stipulation in the contract of his principal with his employer, to submit the work to the decision of others.

2. Where the charge to the jury was very full, and covered the whole ground necessary to enable the jury to apply the law to the matters in issue, the judgment will not be reversed for a refusal to charge further.

3. This court will not retry a case as if it were both court and jury.

[No. 82.]

Argued Dec. 14, 1875. Decided Jan. 10, 1876.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The court below charged the jury as follows:

This is a suit upon a contract made between the defendants and plaintiffs, whereby defendants have guaranteed the performance, by one John Allen, of all the covenants and undertakings to be performed by Allen in a certain contract bearing date July 18, 1871, made between plaintiffs as parties of the first part, and Allen as party of the second part, and whereby plaintiffs had agreed to construct for Allen the wrought iron work in a jail then about to be built at Rockford, in this district, and for the building of which Allen was the principal contractor.

To fully understand, then, the obligations and liabilities of the parties under the contract on which this suit was brought, it is necessary to ascertain definitely, the duties and obligations which plaintiffs and Allen had respectively assumed under their contract of July 18, as the defendants are certainly not liable to the plaintiffs, unless Allen is in default upon his contract, as they are only Allen's sureties. The contract between plaintiffs and Allen recites in substance that Allen had entered into a contract with Winnebago Co., to build and complete a jail on the Court-house Square at Rockford, according to certain plans and specifications prepared by Cass Chapman, an architect of Chicago, and that copies of said plans and specifications, so far as they related to the wrought iron work, were then in the hands of plaintiffs, and the plaintiffs agreed to furnish the material for, manufacture, deliver and erect in its proper position, all the wrought iron work for said jail mentioned and provided for in said plans and specifications, under the caption of "specifications for wrought iron work;" that they would furnish and erect the same as fast as the jail building should be ready to receive it—stipulating for fifteen days' notice of

such readiness—for which Allen was to pay plaintiffs \$9,150 in four equal installments; one fourth when one quarter of the work was done; one fourth when one half of the work was done; one fourth when three quarters of the work was done, and balance on completion of work, 20 per cent. to be kept from each payment until the final completion of work. In case any changes in the iron work should be required by the building committee having charge of said work, the plaintiffs were to do the work in accordance with such changes, and any increase of cost be made up to them; and in case of decrease of cost by such changes, the decrease was to be deducted from the contract price.

These specifications for wrought iron work, it will thus be seen, are an important element in the contract between Allen and plaintiffs. Indeed, the undertaking on the part of plaintiffs in this contract with Allen is to furnish the materials for, manufacture and erect in place, the wrought iron work called for by those specifications in the manner required by the plans and specifications; and it is only by reference to these plans and specifications that we are able to ascertain definitely what plaintiffs agreed to do.

These specifications and the plan and drawings have been so frequently referred to and read, in whole or part, during the examination of witnesses, and in the argument of counsel, as to make you familiar with the entire details thereof.

The work thus called for may be briefly described as:

1. A lining for the interior of the jail, which was to be made of boiler-iron plates one quarter inch thick, not less than twenty four nor more than thirty inches wide, and in one piece from floor to ceiling.

These plates were to be riveted to angle or T iron bars as might be required in the formation of angles; the T iron bars to have flanges extending two inches each way, and to weigh not less than four pounds to the lineal foot.

The rivets to be three eighths inches in diameter, of best Swedes iron, and plates and angles or T iron drilled and countersunk.

2. There was to be an open-work partition.

3. Window frames and sash.

Outside window guards with steel rods.

Inside window guards with iron rods.

4. Cell doors, combination of angle arm and interlacing steel bars.

5. Bedsteads.

6. Anchors.

7. Stairs.

8. Water-closets.

The first requisite as to the character of the wrought iron work, as set forth in these specifications is, that all the iron work is to be made of the best quality Lake Superior iron, unless otherwise ordered in writing by the superintendent.

The plaintiffs claim that they proceeded, according to the terms of their agreement, to provide the material and manufacture the iron work required, substantially in the manner called for by the plans and specifications, the most of the work being done at plaintiff's shop in Indianapolis, and had proceeded to put the iron lining and five of the window frames in place, and were ready to proceed to put the

open-work partition and cell doors and other parts of the work in place, when they were stopped by said Allen and the building committee in charge of the work. In fact, the plaintiffs insist that they had substantially performed their contract when they were stopped, the work then being all or substantially all made and ready to be put in place.

The defendants, besides interposing several technical or rather legal defenses arising out of what they claim to be the law of the case on the admitted facts, insist that the work brought upon the ground and offered to be put in place did not conform to the plans and specifications, and that the same was, therefore, rightfully rejected by Mr. Allen and building committee.

It is admitted that the lining furnished by plaintiffs has been built into the wall since the plaintiffs were stopped in the performance of their contract, and has become apparently a part of the structure, without objection from the superintendent or building committee.

It is conceded, on the part of the plaintiff, that in several important particulars this work is not in accordance with the specifications; but it is also insisted that a literal compliance with the specifications and plans in those respects is practically impossible, and they are, therefore, excused in the premises.

For instance, it is admitted that the iron used is not known in the market as Lake Superior iron, although the specifications call for Lake Superior iron; and plaintiffs have introduced evidence for the purpose of establishing the fact that there is no such distinctive brand or grade of wrought iron known to the trade as Lake Superior iron; plaintiffs contending that the Lake Superior ores are largely used in mixture with other ores in the manufacture of iron, and that the iron used by them was made partly from such ores.

So, too, while the specifications call for boiler-plate iron, the plates extending from floor to ceiling, in the construction of the iron lining, it is contended that boiler-plate is not what is generally used in this species of work, and that this expression is inadvertently used in the specifications.

The open-work partition was also made in two sections, intended to be joined by transverse bars or battens, when the two sections came together in the middle of the partition.

The lining plates do not extend from floor to ceiling in one sheet, but are made of two or more plates jointed together with angle iron; and in the vertical joints of the iron plates, angle iron was used instead of T iron (although as to the use of angle instead of T iron, I understand plaintiffs as contending that they had their choice or election which to use).

For want of conformity to the specifications mainly in these particulars which I have enumerated, and also by reason of the imperfection of the workmanship in several particulars, Mr. Allen claimed the right to reject the work tendered by plaintiffs, and it becomes your duty to determine, under the law and the evidence, how far he was right in rejecting said work.

As to the provision requiring all the iron-work to be made of best quality Lake Superior iron, it is for you to say, as a matter of fact, from the evidence, whether it was possible for

the plaintiff to have literally complied with this condition, or whether, by using iron made partly from Lake Superior ore, this condition has been substantially complied with. Conditions of this nature, in contracts or specifications, must be construed in the light of practical affairs; and if you find from the evidence that there was no such distinctive article as "Lake Superior iron" known to persons engaged in the iron trade, then you will be justified in assuming that the parties in using the term really meant and intended to describe iron manufactured partly from Lake Superior ores; and if the plaintiffs used such iron, they have so far complied with their contract.

In connection with this branch of the case, and as throwing some light upon the construction the parties intended to put upon the term used to describe the material, I call your attention to the fact that, so far as my recollection serves me, there is no proof that any objection was made to the material or kind of iron employed, with the exception of the lining plates. The building committee, architect and Mr. Allen criticised the rivets, the angle iron, the way the holes were made in the iron, the lack of conformity of the bend or angle in the reticulated bars, to the plans; but no fault was found, so far as my recollection of the evidence goes, with the material itself. I call your attention to this circumstance, and you will doubtless give due weight to it.

As for failure to use the kind of plates and T iron bars in the iron lining called for by the specifications, the plaintiffs, if I rightly understand their position, mainly depend upon the consent of Mr. Allen and the building committee to accept the building as made, rather than upon their right to insist that they have complied in that regard with the specifications.

You will remember the evidence on this point. The iron used for the lining was not boiler-iron, but a harder kind of plate iron, which one of the witnesses called jail iron, perhaps as good a name as any to designate the article used; and the plates did not extend from floor to ceiling, but the strips consisted of two plates joined in the middle by means of angle iron. When the attention of Mr. Allen and the building committee was called to this defect, the plaintiffs admitted the deviation from the specifications, and proposed to make it satisfactory in that particular by putting a batten over the seams.

This, I think, they had the right to do under the clause in the contract which permits changes to be made, although the defendants, who had guaranteed Allen's contract, were not consulted in relation to this change.

And if you find from the evidence that Mr. Allen and the building committee agreed to accept the lining, as made with the plates joined in the middle instead of being continuous from floor to ceiling, and with the angle-iron joint instead of T iron joint, provided the seam was covered by the batten, then the work as made should be deemed by the jury to have been substituted, by agreement of parties, for that described in the specifications; the jury taking into consideration, in fixing the value of the work as made, any imperfections in the riveting or other workmanship, and the work yet remaining to be done, in order to complete said

lining at the time it was abandoned by plaintiffs.

In other words, the jury are to determine, from the evidence, the value of the lining to Mr. Allen, for the purpose of completing his contract as plaintiffs left it.

As for the open-work partition, two objections may be taken to it:

1. That the bars did not extend continuously from floor to ceiling, as shown in plan.

2. That the workmanship was imperfect, the angles in the reticulated bars not being turned sharply so as to leave a flat surface resting against the upright bar, and the rivets not being countersunk, as shown in the plan.

You have heard the testimony on all these points, and have had the plans shown and explained to you, and it is for you to say, under the proof, whether this part of the work complied with the contract. If it did not, then Mr. Allen was not bound to accept this partition as part of the work under the contract, and had the right to forbid plaintiffs from putting it up.

A word here in regard to the degree of perfection to which work of this character must be carried, to comply with the drawings and plans.

The artist who prepares the plans, works to an ideal standard of perfection. The mechanic who makes the work, is limited by the want of pliability of materials, imperfections in machinery and, to some extent, by lack of skilled labor. For these reasons, we quite frequently, if not universally, find that the finished work falls, in many respects, much short of the ideal shown in the picture or drawing. But there should always be a substantial compliance with the model. He must produce, in all essential particulars, the thing represented, and come as near to the standard as the state of the art will allow. His contract binds him to this, and he should not have undertaken the task if he had not the skill or means to accomplish it.

So in regard to the cell doors, window-frames and grating. If the testimony satisfies you that these portions of the work were made by plaintiffs substantially as required in the drawings, and that if the doors are too large for the openings left to receive them; it is due either to the mistake of the mason or to a mistake in the scale on which the drawings were made, then plaintiffs ought not to suffer, and should recover for the value of the window-frames put in place, and also for the value of that ready to be put in place, if it was made in conformity with the drawings, but subject to this reservation.

The contract was an entirety, and the plaintiffs had no right to put in the window-frames, cell doors, etc., even if they complied in all respects with the drawings and specifications, if they at the same time insisted on putting in the partition also, which did not conform to the plans; and if you believe from the evidence that the plaintiffs insisted on putting in a partition which was not made according to the plans, then they cannot recover for the doors and window-frames not put up and used, even though they may be properly constructed.

If you find from the evidence that the contract has been partially performed by the plaintiffs, and that they have been prevented from performing the remainder of the work by

Mr. Allen, and that Mr. Allen has adopted or used a portion of the work, such as the iron lining and five window-frames, then it will be your duty to ascertain, from the evidence, the value of the work thus done and appropriated, and the plaintiffs will be entitled to recover the value so found as damages in this case; but you should also deduct, from the amount thus found, any sums due from plaintiffs to Allen, for advances made by him on account of plaintiffs, such as freight and cartage paid, or any money paid plaintiffs by Allen on account of said work; also any damages which Allen has sustained by reason of the non-performance of said contract between plaintiffs and Allen, if you believe there is any breach of said contract which entitles Allen to damages; and in estimating Allen's damages you must be governed by the evidence in the case, applying it in the same manner as you would do if Allen had not a suit for damages on said contract.

Prior to the delivery of the above charge, the defendants asked the court to give the following instructions, which request was refused:

That, if it appeared from the evidence that the plaintiffs had abandoned their contract with said Allen before its entire completion, and after only a partial performance, they could not recover in an action on the special contract.

Also, that, even if it appeared from the evidence that the plaintiffs, after commencing work under their said contract, had been improperly obstructed in, or prevented from the performance of the same, they could not maintain an action on the special contract sued on, without proving a tender to said Allen of the balance of the work required to be done by them by their said contract with him.

Also; that, if it appeared from the evidence that the payments actually made to the plaintiffs by said Allen added to the amounts required to be paid by him to said Reeve under the aforesaid contract with him (if such contract was the most economical one that said Allen under the circumstances could make for the completion of said wrought iron work, after the same was abandoned by the plaintiffs), equaled or excelled the whole price at which the work was to be done by the plaintiff, then there could be no recovery.

Also, that the defendants, being mere sureties upon a special written contract, were not necessarily liable, even though an action might be sustained against Allen.

Also, that, under the facts as disclosed by the evidence, no action was sustainable upon the written contract mentioned in the declaration; but that the plaintiffs' remedy was limited to an action upon an implied contract on the part of Allen to pay for the value of such work as had been retained by him after it was furnished by the plaintiffs, in alleged performance of their contract.

Also, that the defendants were not liable upon their guaranty, if the plaintiffs were not entitled to recover upon their written contract with Allen.

Messrs. Sleeper & Whiton, for plaintiffs in error:

When a man employs a builder to erect a house for him, according to plans and specifications, the owner is entitled to demand that even his whims, if stipulated for in the contract,

shall be faithfully carried out; and many respectable courts hold that if they are not, and the builder takes the responsibility of departing from the contract in constructing a building, in a material matter, he shall not even be allowed on a *quantum meruit* the value of his labor and materials, although appropriated by the owner.

Champlin v. Rowley, 18 Wend., 258; 18 Wend., 187; *Smith v. Brady*, 17 N. Y., 173; *Witherow v. Witherow*, 16 Ohio, 238; 2 Pars. Cont., 522, 524, n., 658, n.

The county authorities had a right to reject the partition tendered by Hough & Co., or they had not. If they had the right, then it cannot be pretended that Hough & Co. can maintain an action on the special contract, or indeed in any form of action.

Dermott v. Jones, 2 Wall., 1 (69 U. S., XVII., 762).

This was an Illinois contract, and it is well settled in the courts of that State, that where there is a written contract, and the same is only partially performed, as in this case, the party abandoning the work cannot sue in *indebitatus* for the value of his labor and materials, unless he can show an abandonment of the written contract by mutual consent, or that he was prevented from fulfilling the written contract by some act of the party with whom he contracted.

See, *Phelps v. Hubbard*, 59 Ill., 79, and cases cited; 2 Pars. Cont., 56.

Besides, if a proper tender of all the work had been made by Hough & Co., they were not entitled to sue on the written contract until the work was accepted by the umpire, whose decision was to be final as to the proper performance of the work.

2 Pars. Cont., 59; *Martin v. Leggett*, 4 E. D. Smith, 255; *Smith v. Briggs*, 3 Den., 73; *Hudson v. McCartney*, 83 Wis., 381; *Bannister v. Putty*, 35 Wis., 215.

As to when a party bound by a written contract may resort to a general *assumpsit*, see, notes to *Cutler v. Powell*, 2 Smith L. C., 49; *Slater v. Emerson*, 19 How., 239 (60 U. S., XV., 633); 2 Pars. Cont., 522, and notes.

The court in its charge should have instructed the jury that, inasmuch as the partition did not conform to the contract, neither Allen or his sureties were liable for its value, and that because no legal excuse was shown by Hough & Co. for abandoning the work on a non-acceptance of the partition, no action in any form was maintainable against Allen or his sureties.

Dermott v. Jones, 2 Wall., 1 (*supra*); *Phelps v. Hubbard*, 59 Ill., 79.

Mr. J. N. Jewett, for defendants in error.

Mr. Justice Miller delivered the opinion of the court:

John Allen having contracted with the Supervisors of the County of Winnebago, Illinois, for the building of a county jail, made another contract with defendants in error, who were plaintiffs below, for all the wrought iron work necessary in the construction of the building. The plaintiffs here, who were defendants below, became sureties for Allen by a written guaranty that he would perform his part of the contract; that is, would pay as he had promised these sub-contractors.

See 1 OTTO.

In the progress of the work, differences arose between Allen and a sub-contractor, growing out of the refusal of the supervisors to accept the work furnished by the latter, on the ground that it was not in compliance with the specifications of Allen's contract with the supervisors, and with defendants in error. After much of the work was done and put in place, it was condemned and the work abandoned by defendants in error, who brought this suit against Allen's securities for his failure to pay as they had guarantied he would.

The errors assigned relate to the charge of the court, and the refusal to charge as requested by plaintiffs in error.

The main ground of error seems to be, that the court did not treat Hough & Butler, the sub-contractors under Allen, as bound by all Allen's contract with the supervisors. But, while they accepted the specifications for the wrought iron work which were in Allen's contract with the supervisors, they did not agree to be bound by the supervisors' acts in accepting or rejecting the work as coming up to these specifications.

This Allen did in his contract with them; and no doubt this has led to the present controversy. The supervisors reserved the right to decide as between them and Allen whether the work conformed to the specifications. Allen reserved no such power in his contract with defendants. These latter had a right, in the event of a difference on that subject, to have the difference settled by a court of law; and Allen ran that risk if he rejected any of their work. But the supervisors could reject work without such hazard, because Allen had agreed to submit to their judgment in case of such a difference.

The plaintiffs desired to have the court give the jury a more specific construction of the contract than it did as to the kind of work required, and also as to the failure of defendants in error to perform the work as so construed.

The court repeated to the jury the details of the contract on the points where the failure was alleged and then told the jury that, unless the contractors had complied substantially with these specifications or a strict compliance had been waived, they could not recover. The charge on these points was very full, and covered the whole ground necessary to enable the jury to determine the law to the matters in issue. We do not find in it any error.

The fact that Allen will, under the judgment recovered by defendants in error, taken in connection with the amount he has had to pay to others to complete the wrought iron work, be a loser to the amount of several thousand dollars does not prove the instructions of the court to be wrong. If there was any error, it was committed by the jury, and not by the court. It is only another one of those cases, so common from that circuit, in which, with the whole charge of the court and much of the testimony in the bill of exceptions, this court is expected to retry the case as if it were both court and jury. Our repeated refusal to do this will be adhered to, however counsel may continue to press on our attention the mistakes of juries. They are beyond our jurisdiction.

Judgment affirmed.

THE NEW LAMP CHIMNEY COMPANY,
Plff. in Err.,
v.
THE ANSONIA BRASS AND COPPER
COMPANY.

(See S. C., 1 Otto, 656-667.)

Bankrupt decrees, effect of—discharge not given to corporation—balance of claim recoverable.

1. Decrees of the district court rendered in pursuance of the power conferred by the Bankrupt Act, are entitled in every other court to the same force and effect as the judgments or decrees of any domestic tribunal, so long as they remain unreversed and are not annulled.

2. Under the Bankrupt Act, no discharge shall be granted to any corporation or joint-stock company, or to any officer or member thereof.

3. A claim proved against a corporation in voluntary proceedings in bankruptcy instituted by itself, is not discharged beyond the amount received as dividends, by the proceedings, and a recovery can be had for the balance of the claim.

[No. 85.]

Argued Dec. 14, 1875. Decided Jan. 10, 1876.

IN ERROR to the Supreme Court of the State of New York.

This was an action commenced by the defendant in error, the Ansonia Brass and Copper Company, against plaintiff in error, in the Supreme Court of the State of N. Y. in 1870, for debt on promissory notes.

The plaintiff in error, for defense in that action, set up the matter on which it continues to make issue in this court, i. e., proof of the debt in alleged voluntary proceedings in bankruptcy of plaintiff in error.

Judgment was for defendant in error.

Plaintiff in error appealed to the General Term of said Supreme Court where the judgment was affirmed. 64 Barb., 435.

Plaintiff in error then appealed to the N. Y. Court of Appeals, where said judgment was affirmed. 53 N. Y., 123.

The case is more fully stated in the opinion.

Mr. John M. Martin, for plaintiff in error:

In the case of those who prove their debts, the Act distinctly declares that such proof shall be deemed a waiver of all right of action against the bankrupt, and it makes no distinction in case of proof between persons and corporations.

In the case of those who have provable debts and do not prove them, and the bankrupt is not discharged, action may be brought on the claim after it is determined that there is to be no discharge.

In this respect there is no distinction between a corporation declared bankrupt under the 87th section of the Act, and an individual who fails to get a discharge under the 32d section of the Act, except that a corporation can always be sued when there is no proof, because it never can be discharged, while the individual can only be sued when there is no proof and no discharge. And it is submitted that the Court of Appeals erred in deciding the case, by overlooking the distinction between these two clauses and the two classes of cases to which they refer.

See, *Ansonia B. & C. Co. v. Lamp Chimney Co.*, 64 Barb., S. C., 435; *Bennett v. Goldthwait*, 109 Mass., 494; *Wilson v. Capuro*, 41 Cal., 545; *Everett v. Derby*, 5 Law Rep., pp. 225, 227; *Haxtun v. Corae*, 4 Edw. Ch., 585; affirmed, 2 Barb. Ch., 508; *U. S. v. Fisher*, 2 Cranch,

358; *Maillard v. Lawrence*, 16 How., 251; *Jackson v. Lewis*, 17 Johns., 475; *People v. R. R. Co.*, 24 N. Y., 487; *Turnpike Co. v. People*, 9 Barb., N. Y., 161; Vatt., b. 2, ch. 17, sec. 263; Sup., b. 161.

In the courts below it was alleged, and probably will be here, that the United States District Court did not acquire jurisdiction of the proceeding in bankruptcy, because the petition did not show that it was duly authorized by a vote of a majority of the corporators present at a legal meeting of the corporators, but only by a majority of the trustees, not the corporators; and that, by reason of such want of jurisdiction, the defendant was not bound by those proceedings, and had a right to the action.

One answer to that allegation is, that the petition giving the court jurisdiction is exactly in the form prescribed by this court pursuant to the 10th section of the Bankrupt Act.

Another answer is, that the plaintiff in error was a manufacturing Company, formed under the New York Manufacturing Act of 1848, which authorizes any three persons to form a corporation, and declares that the trustees thereof shall be stockholders. N. Y. Sess. L. 1858, ch. 40, secs. 1, 2. By the statement of authority filed in this case, it appears that the trustees met and voted, and that a majority of the trustees present at such meeting authorized the president to file a petition. And if there was a majority then present, there must have been at least three at the meeting, if no more; and three were enough to constitute, and for anything that appears in the record, they did constitute the whole Corporation.

A court, in a collateral proceeding like this, is bound to presume they were such.

Sprague v. Litherberry, 4 McLean, 442; *Biggs v. Blue*, 5 McLean, 148.

The decisions of courts, like the U. S. District Court sitting in bankruptcy, and having an exclusive jurisdiction, are conclusive in all other courts. *Ex parte Norris*, 4 Bk. Reg., 10; S. C., Am. L. Reg., 216; *Lady Bryan Min. Co.*, 8 Abb. U. S., 527; *Gelston v. Hoyt*, 8 Wheat., 248; Op. Story, 313.

And this, although no jurisdiction be shown on record.

McCormick v. Sullivan, 10 Wheat., 192; *Ex parte Watkins*, 8 Pet., 198; *Foot v. Stevens*, 17 Wend., 483; *Hart v. Seixas*, 21 Wend., 40; *Hug v. Hutchinson*, 14 How., 586.

Nothing shall be intended to be out of the jurisdiction of a superior court, but that which is shown to be so.

Peacock v. Bell, 1 Saund., 74; *Kundolf v. Thalheimer*, 17 Barb., 506; *Kenney v. Greer*, 13 Ill., 432; *Kelsey v. Wyley*, 10 Ga., 371.

Every presumption is made in favor of a court of general jurisdiction.

Sprague v. Litherberry (*supra*); *Biggs v. Blue* (*supra*); *Falkner v. Guild*, 10 Wis., 565; *People v. Nevins*, 1 Hill, 154.

Mr. D. D. Lord, for defendant in error:

The petition in bankruptcy, the adjudication in bankruptcy, the proof of debt and all the proceedings in the bankrupt court, were void, *ab initio*, and so, ineffectual to suspend or to bar action on the debt.

A corporation can become a voluntary bankrupt only upon the petition of an officer of the corporation, "duly authorized by a vote of a

majority of the corporators present at a legal meeting called for the purpose," sec. 37 Bankrupt Act. In this case, the petition was authorized by a majority of the trustees, not of the corporators. This is a jurisdictional defect.

In re Lady Bryan Mining Co., 4 Bk. Reg., 86; affirmed on review by the circuit court, 4 Bk. Reg., 181.

The meeting must be of corporators *qua* corporators.

If a court have jurisdiction, but proceed *inverso ordine*, the error is available only on review, and its judgment is valid until reversed. But if the court have not jurisdiction, its judgment is an absolute nullity, and is impeachable collaterally.

Kerr v. Kerr, 41 N. Y., 275; *Kinnier v. Kinnier*, 45 N. Y., 535; *Newman v. Supra.*, 45 N. Y., 688; *Borden v. Fitch*, 15 Johns., 121; *Mills v. Martin*, 19 Johns., 7; *Chapman v. Brooklyn*, 40 N. Y., 872; *Cooper v. Reynolds*, 10 Wall., 816 (77 U. S., XIX., 932); *The Marshalsea*, 10 Co., 68; *Wise v. Withers*, 8 Cranch, 381; 1 Smith, L. C., 816, note by Hare; 2 Phil., Ev. Cow. & H's ed., 117, note 298; *Tucker v. Tucker*, 4 Keyes, 150; *Hastings v. Farmer*, 4 N. Y., 296; *In re Penn*, 8 Bk. Reg., 145.

The Court of Bankruptcy is a court of special and limited jurisdiction, in the sense that, except its proceedings show jurisdiction on their face, they are void and questionable collaterally.

Perkin v. Proctor, 2 Wils., 382; *Hills v. Mitson*, 8 Exch., 750; *Service v. Heermanoe*, 1 Johns., 91; *Roosevelt v. Kellogg*, 20 Johns., 208; *Stephens v. Ely*, 6 Hill, 607; *Sackett v. Andrews*, 5 Hill, 827; *Maples v. Burnside*, 1 Den., 332; *Varnum v. Wheeler*, 1 Den., 831; *Coates v. Simmons*, 4 Barb., 403; *McCormick v. Pickering*, 4 N. Y., 277; *Turner v. Bk.*, 4 Dall., 11; *Hornthall v. Collector*, 9 Wall., 565 (76 U. S., XIX., 562); *Miller v. U. S.*, 11 Wall., 299 (78 U. S., XX., 142); *Small v. Wheaton*, 4 E. D. Smith, 806.

Assuming the validity of the proceedings in bankruptcy, the fact that defendant in error proved its claim, is ineffectual to defeat a recovery thereon.

The right to pursue the debtor after the Bankrupt Court has administered all his effects, and after the termination of the proceedings in bankruptcy, and a denial of discharge, in no way frustrates the policy of the law, or interferes with the proceedings of the Bankrupt Court.

In this case there was no discharge, because the law peremptorily denies a discharge to the corporation debtor. Sec. 37. When judgment below was recovered, the effects were administered, the assignee discharged, the proceedings in bankruptcy terminated and the matter was dismissed from the jurisdiction of the Bankrupt Court.

Matter of Robinson, 6 Blatchf., 253; *Matter of Rosenberg*, 3 Bene., 14; *Matter of Wright*, 36 How. Pr., 175; *Matter of Migel*, 2 Bk. Reg., 153; *Davis v. Anderson*, 6 Bk. Reg., 153; Bank Act, sec. 26; *In re Kimball*, 6 Blatchf., 292.

Mr. Justice Clifford delivered the opinion of the court:

Corporations, whether moneyed, business or commercial, and joint-stock companies, are subject to the provisions of the Bankrupt Act; and the 37th section of the Act provides to the effect that, upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of the same, made and presented in the manner provided in respect to other debtors, the like proceedings shall be had and taken as are required in other cases of voluntary or involuntary bankruptcy; but the same section provides that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof. 14 Stat. at L., 535.

Nine overdue promissory notes executed by the Corporation defendants were held by the Corporation plaintiffs, amounting to the sum of \$5,266.94; and they instituted the present suit in the Supreme Court of the State to recover the amount.

Service being made, the defendants appeared, and set up as a defense in their answer, that they, the defendants, had on their own application been declared bankrupt, and that the plaintiffs had proved the claim in suit in the bankrupt proceedings, and had been paid a dividend on the same, and that they were thereby prevented under the Bankrupt Act from recovering the claim or any part of the same in a subsequent action.

Issue being joined, the parties went to trial; and, the bankrupt proceedings having been introduced in evidence, the defendants moved the court to dismiss the suit, insisting that the plaintiffs, having proved the claim in the bankrupt proceedings and received a dividend on the same, had waived the cause of action; but the presiding justice denied the motion, and directed the jury to render a verdict in favor of the plaintiffs for the balance due on the notes. Exceptions were duly filed by the defendants, and they appealed to the General Term, where the judgment was affirmed; the court holding that the bankrupt court had no jurisdiction to adjudge the defendant Corporation bankrupt, and that the proceedings in bankruptcy were void.

Brass and Copper Co. v. Lamp Chimney Co., 64 Barb., 436.

Still dissatisfied, the defendants appealed to the Court of Appeals of the State, where the parties were again fully heard; and the Court of Appeals affirmed the judgment rendered by the court sitting in General Term, holding that the decree of the Bankrupt Court adjudging the defendant Corporation bankrupt, and the subsequent proceedings in pursuance of the same, did not have the effect to discharge the Corporation from the claim in suit beyond the amount paid to the plaintiffs as dividends, even though the claim was proved by the plaintiffs in the bankrupt proceedings. *S. C.*, 53 N. Y., 124.

Sufficient appears to show that the defendants are a manufacturing Corporation organized under the law of the State, which authorizes three persons to form such a Corporation, and requires that the trustees shall be stockholders of the Company. Sess. L., 1848, ch. 40, p. 54.

Nothing being alleged to the contrary, it must be assumed that the Corporation was duly organized. It appears that a meeting of the trustees was duly called and notified to inquire

into the ~~condition~~ of the affairs of the Corporation: that the meeting was regularly held, and, it having been ascertained to the satisfaction of the meeting that the Corporation was insolvent, it was voted and resolved, by a majority of the trustees present, that the President of the Company be required to file a petition in the district court that the Corporation may be adjudged bankrupt. Such a petition was accordingly filed; and, if the President of the Company was duly authorized to sign and file it, the plaintiffs do not deny that the bankrupt proceedings were regular.

Two objections are taken to the jurisdiction of the Bankrupt Court, which, in point of fact, involve the same considerations. They are, that the majority of the stockholders did not sign the petition filed in the district court, and that the President of the Corporation was not authorized to sign it; which is a mere inference from the fact that the meeting, when the vote and resolution were adopted, was a regular meeting of the trustees; but, inasmuch as the statute of the State requires that the trustees shall be stockholders, and no objection is made to the organization of the Company, it may well be presumed that the trustees were stockholders as required by law.

As before remarked, three persons may form such a corporation. The record shows that a majority of the trustees present adopted the vote and resolution, which necessarily implies that a minority did not concur; and if not, then certainly there must have been three or more present, and the record does not show that the whole capital stock of the Company is not owned by three persons.

Viewed in the light of these suggestions, it follows that the want of jurisdiction in the Bankrupt Court is not clearly shown, and that the case is plainly one where every presumption should be that the action of the court was right.

Due notice, it is conceded, was given to all concerned, and that the defendants appeared in the Bankrupt Court, and that they never made any objection to the jurisdiction of the court; and, in view of these circumstances, the rule is that every presumption is in favor of the legal character of the proceedings. *Voorhees v. Bk.*, 10 Pet., 473.

Concede that, still it is said that courts created by statute cannot have jurisdiction beyond what the statute confers; which is true; but no such question arises in the case before the court, as all concede that the district court had jurisdiction of the subject-matter, and that the defendants appeared, and claimed and exercised every right which the Bankrupt Act confers. They are, therefore, estopped to deny the jurisdiction of the court; nor are the plaintiffs in any better condition, unless it appears that the bankrupt proceedings are actually void. Void proceedings, of course, bind no one not estopped to set up the objection; and, in order to establish the theory that the proceedings in this case are void, the plaintiffs deny that the President of the Corporation was authorized to make and file the petition in the district court. *McCormick v. Pickering*, 4 N. Y., 279.

Such a petition might properly be made by the President of the Company, and be by him presented to the district court, if he was there-

to duly authorized at a legal meeting called for the purpose by a vote of a majority of the corporation; and whether he was so authorized or not was a question of fact to be determined by the district court to which the petition was presented; and the rule in such cases is, that if there be a total defect of evidence to prove the essential fact, and the court find it without proof, the action of the court is void; but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that purpose. Nor is the distinction unsubstantial, as in the one case the court acts without authority, and the action of the court is void; but in the other, the court only errs in judgment upon a question properly before the court for adjudication, and of course the order or decree of the court is only voidable. *Staples v. Fairchild*, 3 N. Y., 46; *Miller v. Brinkerhoff*, 4 Den., 119; *Voorhees v. Bk.*, 10 Pet., 473; *Kinsler v. Kinsler*, 45 N. Y., 539.

Jurisdiction is certainly conferred upon the district court in such a case, if the petition presented sets forth the required facts expressly or by necessary implication, and the court, upon proof of service thereof, finds the facts set forth in the petition to be true; and it is equally certain that the district court has jurisdiction of "all acts, matters and things" to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the bankrupt proceedings. 14 Stat. at L., 518.

Power, it is true, is vested in the circuit courts in certain cases to revise the doings of the district courts, and in certain other cases an appeal is allowed from the district court to the circuit court; but it is a sufficient answer to every suggestion of that sort that no attempt was made in the case to seek a revision of the decree in any other tribunal. Nothing of the kind is suggested, nor can it be, as the record shows a regular decree unreversed and in full force.

Grant that; and still the proposition is submitted that the decree was rendered without jurisdiction, for the reason assigned; and that that question is open to the defendants, even though the decree was introduced as collateral evidence in a suit at law or in equity in another jurisdiction. But the court here is entirely of a different opinion, as the district courts are created by an Act of Congress which confers and defines their jurisdiction; from which it follows that their decrees rendered in pursuance of the power conferred are entitled in every other court to the same force and effect as the judgments or decrees of any domestic tribunal, so long as they remain unreversed and are not annulled. *Shawhan v. Wherrett*, 7 How., 643; *Huff v. Hutchinson*, 14 How., 588; *Parker v. Danforth*, 16 Mass., 299; *Peck v. Barnum*, 24 Vt., 76; 2 Smith, L. Cas., 7th ed., 814.

Judgments or decrees rendered in the district courts may be impeached for the purpose of showing that the particular judgment or decree was procured for the purpose of avoiding the effect and due operation of the Bankrupt Act, and competent evidence is admissible for that intent and purpose; but the judgment or decree of the district court, in a case like the present,

is no more liable to collateral impeachment, except to show that it was designed to prevent the equal distribution of the debtor's estate, than it is to such impeachment in the court where it was rendered. *Pulmer v. Preston*, 45 Vt., 159; *Miller v. U. S.*, 11 Wall., 300 [78 U. S., XX., 142].

Authority to establish uniform laws upon the subject of bankruptcy is conferred upon Congress; and, Congress having made such provision in pursuance of the Constitution, the jurisdiction conferred becomes exclusive throughout the United States. By the Act of Congress, the jurisdiction to adjudge such insolvent corporations as are described in the 37th section of the Act to be bankrupts, is vested in the district courts; and it follows that such a decree is entitled to the same verity, and is no more liable to be impeached collaterally than the decree of any other court possessing general jurisdiction; which of itself shows that the case before the court is controlled by the general rule, that where it appears that the court had jurisdiction of the subject-matter, and that process was duly served or an appearance duly entered, the judgment or decree is conclusive, and is not open to any inquiry upon the merits. 2 Smith, L. Cas., 7th ed., 622; *Freem. Judg.*, 2d ed., sec. 606; *Hampton v. McConnel*, 3 Wheat., 234; *Gelston v. Hoyt*, 3 Wheat., 312; *Slocum v. Mayberry*, 2 Wheat., 10; *Nations v. Johnson*, 24 How., 203 [65 U. S., XVI., 631]; *D'Arcy v. Ketchum*, 11 How., 166; *Webster v. Reid*, 11 How., 437.

Such a decree, adjudging a corporation bankrupt, is in the nature of a decree *in rem*, as respects the *status* of the corporation; and, if the court rendering it has jurisdiction, it can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given. *Way v. Howe*, 108 Mass., 503; *Ex parte Wieland*, L. R., 5 Ch. App., 489; *Bk. v. Olcott*, 46 N. Y., 15; *Revell v. Blake*, L. R. 7 C. P., 306.

Suppose that is so; then it is insisted by the defendants that the case before the court is controlled by the 21st section of the Bankrupt Act, which, among other things, provides that no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, etc. 14 Stat. at L., 526.

Debtors, other than corporations and joint-stock companies, are certainly within that provision; and if corporations are also within it, then it follows that the judgment must be reversed, as the plaintiffs are not entitled to recover. Instead of that, the plaintiffs deny that corporations or joint-stock companies are within that provision, and insist that the case before the court is controlled by the 37th section of the Bankrupt Act, which provides that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof; which is the view of the case taken by the Court of Appeals of the State whose judgment is brought into review by the present writ of error. 14 Stat. at L., 535; *Brass and Copper Co. v. Lamp Chimney Co.* [supra].

Difficulties perhaps insurmountable would at-

tend the theory of the plaintiffs if the 21st section of the Bankrupt Act stood alone; but it does not stand alone; and, being a part of a general system of statutory regulation, it must be read and applied in connection with every other section appertaining to the same feature of the general system, so that each and every section of the Act may, if possible, have their due and conjoint effect without repugnancy or inconsistency.

Statutes must be interpreted according to the intent and meaning of the Legislature; and that intention must, if practicable, be collected from the words of the Act itself; or, if the language is ambiguous, it may be collected from other Acts *in pari materia*, in connection with the words, and sometimes from the cause or necessity of the statute; but where the language of the Act is unambiguous and explicit, courts are bound to seek for the intention of the Legislature in the words of the Act itself, and they are not at liberty to suppose that the Legislature intended anything different from what their language imports. Pott. Dwarria, 146.

Words and phrases are often found in different provisions of the same statute, which, if taken literally, without any qualification, would be inconsistent and sometimes repugnant, when, by a reasonable interpretation — as by qualifying both, or by restricting one and giving to the other a liberal construction — all become harmonious, and the whole difficulty disappears; and in such a case the rule is, that repugnancy should, if practicable, be avoided; and that, if the natural import of the words contained in the respective provisions tends to establish such a result, the case is one where a resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the law-maker.

Section 21, if taken literally, would require that the whole claim of every creditor proving his claim, who is included within its operation, should be forever discharged; but the 33d section of the Act provides that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under the Bankrupt Act. Such debts may be proved, and the provision is that the dividend shall be a payment on account of the debt; but it is incorrect to suppose that the creditor, by proving such a debt, waives "all right of action and suit against the bankrupt." On the contrary, it is well settled that no consequences can be allowed to flow from proving a debt which are inconsistent with the provisions of section 33. *Ex parte Robinson*, 6 Blatchf., 253; *In re Rosenberg*, 2 N. B. Reg., 81.

Where the bankrupt has in all things conformed to his duty, under the Bankrupt Act, he is entitled to receive a discharge; and the 34th section provides that a discharge duly granted shall, with the exceptions specified in the preceding section, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy.

Debts due to the United States are not enumerated in the exceptions contained in section 33; but all admit that such debts may be proved in the bankrupt proceedings; and yet it is set-

tioned law that the certificate of discharge does not release any debt which the bankrupt owes to the United States. *U. S. v. Herron*, 20 Wall., 253 [87 U. S., XXII., 275].

Other examples of the kind might be referred to where it has become necessary to qualify, restrict or limit certain provisions of the Bankrupt Act, in order to reconcile seeming incongruities and inconsistencies; but those mentioned will be sufficient for the present investigation.

Beyond all question, corporations of the kind and joint-stock companies are brought within the provisions of the Bankrupt Act by the 37th section; and the whole administrative proceedings in respect to such bankrupt corporations and joint-stock companies are specifically regulated by that section as a separate feature of the bankruptcy system. Much of the system applicable to such corporations and companies, it is true, is borrowed by general phrases from the other sections of the same Act; but only such portions of the same as are expressly or impliedly adopted by that section are applicable to such corporations and companies, as clearly appears from the distinct features of the regulations prescribed, which are as follows:

(1) That the officer signing the petition for voluntary bankruptcy must be duly authorized by a vote of the majority of the corporators at a legal meeting called for the purpose. (2) That the petition for involuntary bankruptcy may be made and presented by any creditor or creditors in the manner provided in respect to debtors, without any specification as to the number of the creditors or the amount of their debts. (3) That the like proceedings shall be had and taken as provided in the case of debtors. (4) That all the provisions in the Act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examination, disclosing, making over, secreting, concealing, conveying, assigning or paying away his money or property, shall in like manner, and with like force, effect and penalties, apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof. (5) That all payments, conveyances and assignments declared fraudulent and void by the Act, when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. (6) That no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof. (7) That all the property and assets of any corporation declared bankrupt by proceedings under the Bankrupt Act shall be distributed to the creditors of the corporation in the manner therein provided in respect to natural persons. 14 Stat. at L., 585.

Special regulations in respect to petitions are enacted by section 37 of the Bankrupt Act, where the insolvent is a corporation or joint-stock company, different from those prescribed in cases where the insolvent party is a natural person or partnership. But, subject to the exception that no allowance or discharge shall be granted to any such corporation or joint-stock company, all of the administrative proceedings

are to be the same as in case of bankrupt individuals, not because corporations are within the words of the other provisions of the Bankrupt Act, but because the 37th section of the Act provides that the provisions of the Act shall apply to such corporations and joint-stock companies; and it appears that all the administrative proceedings, with that exception, are required to be in conformity to the regulations prescribed in respect to individual bankrupt debtors.

By the terms of the section, corporations adjudged bankrupt are also made subject to the same duties as individual bankrupt debtors in regard to all the matters therein specified; but the emphatic exception to all those general regulations is, that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, officer or member thereof.

Examined in the light of these suggestions, it is as clear as anything dependent upon the construction of a statute well can be, that Congress, in giving jurisdiction to the district courts to adjudge moneyed, business and commercial corporations and joint-stock companies bankrupt, never intended to adopt the introductory paragraph of section 21 or section 32 as applicable to such corporations or companies. Neither corporations of the kind nor joint-stock companies are within the words of either of those sections; and it is equally clear that nothing is contained in section 37 to support such a conclusion; from which it follows that the claim of the plaintiffs, beyond the amount received as dividends, is not discharged by the proceedings in bankruptcy.

Good and sufficient reasons may be given for granting a discharge from prior indebtedness to individual bankrupts which do not exist in the case of corporations, and equally good and sufficient reasons may be given for withholding such a discharge from corporations which do not in any sense apply to individual bankrupts. Certificates of discharge are granted to the individual bankrupt "to free his faculties from the clog of his indebtedness," and to encourage him to start again in the business pursuits of life with fresh hope and energy, unfettered with past misfortunes, or with the consequences of antecedent improvidence, mismanagement or rashness.

Many corporations, it is known, are formed under laws which affix to the several stockholders an individual liability to a greater or less extent for the debts of the corporation, which, in case certain steps are taken by the creditors, become in the end the debts of the stockholders. Such a liability does not, in most cases, attach to the stockholder until the corporation fails to fulfill its contract, nor in some cases until judgment is recovered against the corporation, and execution issued, and return made of *nulla bona*. Stockholders could not be held liable in such a case if the corporation is discharged, nor could the creditor recover judgment against the corporation as a necessary preliminary step to the stockholder's individual liability.

Consequences such as these were never contemplated by Congress; and the fact that they would flow from the theory of the defendants, if adopted, goes very far to show that the theory itself is unfounded and unsound. Instances of

such individual liability are not rare; and it appears that the law under which the defendants were organized makes the several stockholders individually liable to the creditors of the Company, in an amount equal to the amount of their stock, for all debts and contracts of the Company, until the whole amount of the capital stock is subscribed and paid. *Sess. L. of N. Y.*, 1848, p. 56, sec. 10.

Bankrupts other than corporations or joint-stock companies, if they have conformed in all things to their duty under the Bankrupt Act, are entitled to receive a certificate of discharge; and the provision is that such certificate shall operate to discharge such a bankrupt from all debts and claims which by said Act are made provable against his estate, subject, of course, to the exceptions described in the 83d section of the same Act. *Bennett v. Goldthwait*, 109 Mass., 494; *Wilson v. Capuro*, 41 Cal., 545; *In re Wright*, 86 How. Pr., 174.

Since this litigation was commenced, Congress has amended the 21st section of the Bankrupt Act, and provided that where a discharge has been refused, or the proceedings have been determined without a discharge, a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt. 18 Stat. at L., 179.

Comment upon that provision is unnecessary, as it clearly appears that the unamended Act did not discharge the claim of the plaintiffs.

Judgment affirmed.

Cited—18 Bk. Reg., 436; 3 Sawy., 631; 3 Wood, 736.

THE PHILLIPS AND COLBY CONSTRUCTION COMPANY, *Ptff. in Err.*,

v.

MARK T. SEYMOUR ET AL.

(See S. C., 1 Otto, 646-656.)

Averment of performance—effect of default—builder's contract—effect of default—joinder of actions.

1. A party is not obliged to aver readiness to perform a contract, where he alleges circumstances to show that the other party excused his non-performance.

2. Where plaintiffs had partly performed, and the defendant failed to do its corresponding duty under the contract, and defaulted on a payment due, they are not required to go on at the hazard of further loss.

3. If a builder has done a valuable part of the work, but yet has failed to complete the structure within the time limited by his contract, the other party may abandon the contract for such failure.

4. But where the other party urges the builder to go on and pays him for part of his work after such failure, he waives strict performance as to time, and the builder may recover for work actually done.

5. A sum which was to be retained as a security against failure or default of plaintiffs, cannot be held by defendant after his own default has caused the abandonment of the work.

6. Under the common law system of pleading, plaintiff cannot join the actions of covenant and *assumpsit*.

[No. 44.]

Argued Nov. 12, 15, 1875. Reversed Dec. 13, 1875.

Judgment of Dec. 13, 1875, rescinded and annulled Jan. 11, 1876. Affirmed Jan. 11, 1876.

NOTE.—*Time, when of the essence of the contract.* See note to *Slater v. Emerson*, 60 U. S., XV., 626.

See 1 OTTO.

U. S., BOOK 28.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. Edwin H. Abbot and Thomas Dent, for plaintiff in error:

I. The times specified for completing the road and the several sections of the road, were of the essence of the contract in suit. The contract itself declares this intention of the parties. The situation and conduct of the parties, the circumstances in which the property was placed, and the subject-matter of the stipulations, show the necessity and prove the fact of this intention. The intention of the parties governs.

Slater v. Emerson, 19 How., 224 (60 U. S., XV., 626); *Dermott v. Jones*, 23 How., 220 (64 U. S., XVI., 442); *Stinson v. Douaman*, 20 How., 461 (61 U. S., XV., 966); *Shano v. Turnpike Co.*, 2 Pa., 454 (1831); *S. C.*, 8 Pa., 445; *Warren v. Bean*, 6 Wis., 120; *Brashier v. Gratz*, 6 Wheat., 528; *Heckard v. Sayre*, 84 Ill., 142; *Stow v. Russell*, 86 Ill., 86; *Hill v. Fisher*, 34 Me., 144; *Hill v. School Dist.*, 17 Me., 316; *Allen v. Cooper*, 22 Me., 133; *Bk. v. Hagner*, 1 Pet., 455; *Fitzgerald v. Hayward*, 50 Mo., 516.

II. The furnishing to the Company of certificates and estimates from the chief engineer was, by the contract, made a condition precedent to the contractor's right to receive payment. The parties had fixed upon this mode of determining the amounts to be paid. The contractors cannot be allowed to prove their claims by other kind of evidence, and cannot compel any payment until they produce the kind of evidence which the contract prescribes, or show sufficient excuse for not doing so. *U. S. v. Robeson*, 9 Pet., 819; *Smith v. Briggs*, 3 Den., 73; *Smith v. Brady*, 17 N. Y., 175; *Butler v. Tucker*, 24 Wend., 447; *Sharpe v. San Paulo R. Co.*, 8 L. R. Ch., 597; *S. C.*, 29 L. T. (N. S.), 9; *Wadsworth v. Smith*, 6 L. Q. B., 832; *S. C.*, 40 L. J. Q. B., 118; *S. C.*, 19 W., 797; *Ranger v. R. Co.*, 5 H. L. Cas., 73; *Scott v. Liverpool*, 8 De Gex & J., 834; affirming, 1 Giff., 216; *Lamprell v. Bellerica Union*, 8 Exch., 283; *S. C.*, 18 L. J. Ex., 282; *Milner v. Field*, 5 Exch., 829; *S. C.*, 20 L. J. Ex., 68; *Morgan v. Birnis*, 9 Bing., 672; *S. C.*, 8 M. & Scott, 76; *Mills v. Bayley*, 2 H. & C., 36; *S. C.*, 32 L. J. Ex., 179; *Jones v. St. John's College*, 6 L. R. Q. B., 115; *Monongahela Nav. Co. v. Fenlon*, 4 W. & S., 205; *Ennis v. O'Conner*, 3 Harr. & J., 163; *Canal Co. v. Pa. Coal Co.*, 50 N. Y., 250; *Canal Tr. v. Lynch*, 5 Gilm., 521; *Easton v. Pa. & Ohio Canal Co.*, 13 Ohio, 79; *Randal v. Canal Co.*, 1 Harr. (Del.), 233; *Vanderwerker v. R. R. Co.*, 27 Vt., 130; *Clarke v. Watson*, 18 C. B. (N. S.), 278; *S. C.*, 34 L. J. C. P., 148; *S. C.*, 18 W. R., 845; *S. C.*, 11 L. T. (N. S.), 679; *Good-year v. Mayor, etc., of Weymouth*, 1 Harr. & R., 67; *S. U.*, 35 L. J. (C. P.), 12; *Connor v. Belfast Water Commission*, 5 Irish C. L., 55 Q. B.; *Martin v. Leggett*, 4 E. D. Smith, 255; *Canal Co. v. Dubois*, 15 Wend., 89.

III. The facts disclosed in the record, as to the non-payment of the monthly installment by the Company to the contractors, do not amount to prevention by the Company of performance by the contractors of their agreement, and are not a sufficient excuse for their stopping work Nov. 28, 1872, and subsequent non-performance of their contract engagements. *Smoot's case*, 15

Wall., 36 (82 U. S., XXI., 107); *The Harriman*, 9 Wall., 161 (76 U. S., XIX., 629); *Palm v. R. R. Co.*, 18 Ill., 220; *Mill-Dam Foundry v. Hovey*, 21 Pick., 417; *Nae. Co. v. Fenlon*, 4 Watts & S., 205; *Christian Co. v. Overholt*, 18 Ill., 228; *Kinney v. Sherman*, 28 Ill., 523; *Fitzgerald v. Hayward*, 50 Mo., 524.

Messrs. Sleeper & Whiton, J. S. Black and R. D. Mussey, for defendants in error:

In the case of a divisible contract, like the one at bar, where the work is divided into sections to be paid for on estimates, as fast as severally completed, there can be no doubt that a suit is maintainable on the special contract, on the completion of each distinct section; and if, during the progress of work on any section, the contractor is compelled to abandon it, by the willful misconduct or unexpected insolvency of his employers, he may still recover on the special contract, what is due for work done, and damages directly resulting from the breach; such was the rule held in the following cases, where the action was covenant:

Myers v. R. R. Co., 2 Curt., 28; *R. R. Co. v. Story*, 6 Barb., 419; *McLure v. Bush*, 9 Dana, 64; *Bridge Co. v. Pomroy*, 15 Pa., 151; *McCombs v. McKennan*, 2 Watts & S., 216; *Ives v. Van Epps*, 22 Wend., 155; *Rodemer v. Haslehurst*, 9 Gill, 294; *Cort v. R. R. Co.*, 79 Eng. C. L., 126; *Masterton v. Mayor*, 7 Hill, 61.

Mr. Justice Miller delivered the opinion of the court:

The plaintiff in error, who was defendant in the circuit court, is a Corporation organized under the laws of Wisconsin. It had undertaken to build the whole or a large part of the Wisconsin Central Railroad, and had made contracts with the defendants in error, whom we shall hereafter call plaintiffs, as they were in the circuit court, for the construction of a part of this road. These contracts were drawn with minuteness of detail usual in such cases, and provided, among other things, that payments should be made by defendant, as the work progressed, on estimates made monthly by the engineer of the railroad company, on the fifteenth day of each month, for all the work done the previous month, except fifteen per cent. retained by defendant as security for performance on the part of plaintiffs until the work was completed.

The plaintiffs brought their action of covenant on these contracts, alleging that they had commenced the work in the month of July, 1872, shortly after the contracts were signed, and prosecuted it vigorously until sometime in December; that defendant had failed to pay the large sums due by the estimates for work done in October and November; and seeing no prospect of payments, plaintiffs were compelled to abandon the work, and bring this suit. They assert a claim for all the work done as estimated, and for various items of damage suffered by them in consequence of this failure of defendant to comply with its covenant to pay as agreed.

A demurrer to this declaration having been overruled, defendant filed fifteen pleas in bar; also an amended plea; and, on these, numerous issues of fact were finally joined.

A verdict and judgment were rendered in

favor of plaintiffs for \$119,061.46; to reverse which this writ of error is brought.

In this court, plaintiff in error, by one counsel, files forty-five assignments of error, and by another seven more; making fifty-two in all.

The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points. This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on. We can only try to respond to such points made by counsel as seem to be material to the judgment which we must render.

Before we proceed to this examination, however, it may be as well to say that, in addition to a general verdict in favor of plaintiffs for \$107,353.44, the jury made three special findings on matters suggested by the court. These are:

1. That, at the time of the alleged breach of covenant by defendant, it had waived or excused the failure of plaintiffs up to that time to complete certain parts of their work within the time stipulated in the contract; and that plaintiffs were, at the time of said breach, engaged in the performance of said work, with the consent of defendant.

2. That defendant, at the time plaintiffs stopped the work, had given plaintiffs to understand that defendant was financially unable to pay the estimates for work then done, and would probably be unable for a time to pay future monthly installments.

3. That defendant had agreed to pay plaintiffs the extra cost of doing the earth-work by train on certain sections, and that the amount of this extra cost was \$11,708.

These findings must be presumed to be in accordance with the facts, and must stand as foundations for the judgment of the court, unless it can be shown that they are affected by some erroneous ruling of the court in regard to the admission of evidence or instructions to the jury.

We now proceed to notice such objections to the rulings of the circuit court as we deem of sufficient importance to require it.

1. It is said that the declaration is fatally defective because it does not aver that the plaintiffs were ready, willing and able to perform the covenants on their part to be performed by the contract. It is true that this might have been alleged in more formal and apt terms than it is. But they do aver, that, from the time they entered upon the work in July until the 15th day of December—the day of the alleged breach on the part of defendant—they prosecuted the same with all the energy and skill they possessed, having men in large numbers—to wit: more than 1,000—with suitable teams and other equipments, along the whole line of the road of 160 miles; and that defendant had expressed entire satisfaction with the manner in which plaintiffs were doing the work.

We are inclined to think, that, coupled with the allegation that defendant was in default for

non-payment for work actually done, this was sufficient. It is not like a case where a plaintiff has done nothing, but is required to put a defendant in default by offering to perform, or showing a readiness to perform. Plaintiffs here had already performed, and the defendant failed to do its corresponding duty under the contract; and, defendant having defaulted on a payment due, plaintiffs are not required to go on at the hazard of further loss.

2. By the terms of the contract, plaintiffs bound themselves to complete the first section, of forty miles, by the first day of September; the third section, of twenty miles, by the 15th day of the same month; the fourth section, of twenty miles, by the 15th day of November; and so on; and it is conceded that no one of these sections was completed within the time prescribed. It was also a part of the contract, that if plaintiffs failed in this respect, or failed in the opinion of the engineer-in-chief of the railroad company to prosecute the work with sufficient vigor to completion according to its terms, the defendant might declare it abandoned, and the amount retained out of the monthly estimates forfeited. This was fifteen per cent. of each monthly estimate, which, by the agreement, was retained by defendant as security for the due progress of the work.

The main proposition, underlying the whole argument of the defense on the general merits, is, that these covenants to complete certain sections within a definite time, and the covenant to pay, are mutual and dependent covenants; and that time is so far of the essence of this covenant of plaintiffs, that they can recover nothing, because they completed nothing within the specified time.

It is undeniably the general rule that where a specified thing is to be done by one party as the consideration of the thing to be done by the other, that the covenants are mutual and are dependent, if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered before that party can sustain a suit against the other. There is no doubt that, in this class of contracts, if a day is fixed for performance, the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party.

But, both at common law and in chancery, there are exceptions to this rule, growing out of the nature of the thing to be done and the conduct of the parties. The familiar case of part performance, possession, etc., in chancery, where time is not of the essence of the contract, or has been waived by the acquiescence of the party, is an example of the latter; and the case of contracts for building houses, railroads or other large and expensive constructions in which the means of the builder and his labor become combined and affixed to the soil, or mixed with materials and money of the owner, often afford examples at law.

If A contract to deliver a horse to B on Monday next, for which B agrees to pay \$100, A cannot recover by an offer to deliver on Tuesday.

day; but if A agree to deliver a horse, buggy and harness on Monday, and B accepts delivery of the horse and buggy, can he refuse to pay anything, though he accepts delivery of the harness on Tuesday? This is absurd. He waives, by this acceptance, the point of time as to the harness, at least so far as A's right to recover the agreed sum is concerned. If B have suffered any damage by the delay, he can recover it by an action on A's covenant to deliver on Monday; or, if he wait to be sued, he may recoup by setting it up in that action as a cross demand growing out of the same contract.

Such we understand to be especially the law applicable to building contracts.

If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party has the option, when that time arrives, of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor cannot sue on the covenant and recover, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in *assumpsit* for work and labor done, materials furnished, etc., we need not inquire here; but if the other party says to him, "I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed.

For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time; or, if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work.

It is said on the other side in this case, that the right to abandon the contract, by defendant, and retain in his hands the fifteen per cent. are the only remedies he has, and having waived these he has no other. We need not decide this point here; for we are only answering the argument that plaintiffs have lost all right to sue on the contract by their failure to complete the sections in the times named.

As it is perfectly clear from the testimony that defendant, at the time these several sections should have been completed, made no point of the failure to do so, but urged the plaintiffs to go on, expressed satisfaction at the manner in which the work was progressing, and paid the estimate after such failure, the verdict of the jury, that defendant had waived strict performance as to time, was so far well founded as to enable plaintiffs to recover for work actually done.

8. This is an appropriate place to dispose of another objection. Defendant set up in its pleas and offered evidence to prove the damage sustained by those delays.

But the court instructed the jury, that, under this covenant, time was not of the essence of the contract; that on that point it was flexible, and defendant could not recover for the delay. As we have stated above, we are inclined to the opinion that defendant did not, by any of the acts proved in this case, waive

its right to damages arising from this failure of the plaintiffs to complete the sections in time, but only waived the forfeiture, if it may be so called, of all right on the part of plaintiffs to sue. But an attentive examination of the testimony offered, and of the charge of the court on that subject, shows that no legal evidence of any damage was offered.

The attempt was to show that, by the use of the road at an earlier day, much profit would have resulted to defendant. But the witness stated that the road ran through a wild, uninhabited country; that he expected that saw-mills would have been established along the line of the road, and the transportation of lumber incident to the use of their mills would have made the defendant a profit of \$20,000.

The whole basis of this calculation is conjectural, uncertain and vague. It is manifestly no safe basis on which it can be assumed that any business would have been done in the few days of the delay; or that, if done, it would have been done at a profit. There was nothing on which a jury could have done anything but conjecture and speculate, at the hazard of sacrificing truth and justice.

There was, therefore, no error to defendant's prejudice in this part of the case.

5. It is said that the court erred in admitting evidence on the part of plaintiffs, of the profits they would have made on the remaining part of the road if defendant had paid, so that they could go on.

Whether the evidence which was given on this subject was admissible or not was rendered immaterial, by the subsequent ruling of the judge, who instructed the jury to disregard it, and to allow plaintiffs nothing on the ground of such supposed profits; and it is manifest from the record that nothing was allowed for this in the verdict.

6. The foregoing are the material objections, which are of a general character, to the rulings of the court. The items for which the general verdict, \$107,858.44, was had may be divided into three classes:

I. An agreed sum of \$15,000, which was to be paid on the completion of the first sixty miles of the road by the terms of the contract, and which was exclusive of the estimates for work done. Defendant resisted this, on the ground that plaintiffs, not having finished the sixty miles, could not recover it in this action, and also because they had abandoned the work.

In the view we have already expressed, neither of these objections is sound. If, by defendant's breach, plaintiffs were justified in abandoning the work, then they were entitled to all they had earned under that contract, including the \$15,000; because the \$80,000, of which this \$15,000 was part, was a liquidated sum agreed upon as compensation for extra work on the first forty miles of the road which had been completed, and was only withheld, like the fifteen per cent., as security for the future performance by plaintiffs.

Defendant, having by its default terminated the work, had no longer any right to retain either of these sums.

II. The next class consisted of the estimates under the contract, which were unpaid. This is by far the largest item of the verdict; and no serious contest is made except as to \$19,987.55,

which constituted the reserved fifteen per cent. already mentioned.

As in the case of the \$15,000, we are of opinion that, since the work was abandoned and the contract, by reason of the breach thereof by the defendant, ended, it can have no right to retain any part of the estimates for work actually performed. This was to be retained as a security against failure or default of plaintiffs, and cannot be held by defendant after their own default has caused the abandonment of the work.

III. The third class is composed of a large number of items of damages incidental to the abrupt cessation of the work by reason of defendant's failure to pay—such as loss of material, supply road, shanties, travel of hands, depreciation in value of tools, materials, etc., etc. We cannot go into all these. After mature consideration of the very full briefs and arguments on these matters, we see no error in any ruling of the court in regard to them, and so dismiss their further consideration.

7. A more difficult point remains to be considered.

The plaintiffs were allowed to introduce evidence to prove that the defendant had made a verbal promise to pay the extra cost of doing by train the earth-work of the sections between 40 and 46; and the jury found a special and separate verdict, that it had so promised and that this extra cost was \$11,708.

There is no allegation of this promise in the declaration, which is an action of covenant on the sealed agreement. There is no allusion to it or provision for it in that instrument. It is found by the special verdict to be a promise, and the record shows that it was by parol. Defendants objected to the admission of the evidence of this contract, on the specific ground that, if it was valid, it could only be enforced in an action of *assumpsit*, and could not in this action of covenant founded solely on the specialty.

The work done under the written contract could be estimated by the engineer, because a price was fixed by it for everything. He had only to ascertain quantities, apply the prices and ascertain the amount to be paid. For this extra cost of a special mode of doing part of the work, he had no elements out of which to make an estimate.

It is certainly opposed to the common law system of pleading which prevails in the Illinois circuit—to join the actions of covenant and *assumpsit*. If this had been done in the declaration, the defendant could have successfully demurred.

It is equally clear that covenant cannot be sustained on a verbal promise. Can the plaintiffs be allowed to prove a cause of action, which, if alleged in the declaration, would have been fatal to it on demurrer? And can they recover in an action of covenant on a special parol promise?

The judge below said he would not hazard the general verdict by permitting this matter to be embraced in it. He took the special verdict and, notwithstanding his doubts, embraced the amount of it in the final judgment.

This matter grows immediately out of and is intimately connected with the work done under the written contract. It is merely a verbal agreement, that if the plaintiffs would do

the work in a matter different from their obligation, more advantageous to the defendant and more expensive, defendant would pay this difference in expense. It seems reasonable that the claim for this extra cost should be decided in the suit in which the other compensation for the same work is recovered; that plaintiffs, having proved their case and recovered a verdict, should not be compelled to resort to a new suit in which this verdict would stand for nothing. Only a rule of pleading stands in the way, in this court, of doing what the very right of the case requires. We can give the plaintiffs their judgment for the amount of the general verdict, and reject this; or we can do complete justice, and affirm the judgment of the circuit court in full.

But the State of Illinois has adhered to the system of pleading which recognizes the lines that separate the forms of action at common law, and the Act of Congress requires the circuit courts to conform to the mode of pleading of the State in which the court sits. Undoubtedly there was error under that system in admitting proof of a parol contract of this kind in an action of covenant; and as the defendant made this precise objection, and took an exception when overruled, we do not see how we can refuse to give it the benefit of its objection. In those States where the distinction between forms of action have been abolished, the declaration could have been amended, and the two matters joined in the same action. In that case, we might, under the Statute of Jeofails, disregard the error as one capable of removal by amendment below, and as cured by verdict and judgment when it comes here.

But sec. 954 of the Revised Statutes, which was sec. 32 of the Judiciary Act of 1789, 1 Stat. at L., 78, was founded on the English Statute of 32 Henry VIII., and is no broader. This Act of Congress has been frequently construed by this court in such a manner as to forbid its application to the case before us. *Garland v. Davis*, 4 How., 131; *Stockton v. Bishop*, 4 How., 155; *Jackson v. Ashton*, 10 Pet., 480.

There is no room here for amendment. There could have been none in the court below. To allow a verdict to stand which is responsive to no issue made by the pleadings, or which could have been made by any pleading in that action, is further than we can go in the promotion of abstract justice.

The judgment of the circuit court must be reversed, with direction to the court below to set aside the special verdict of the jury for the \$11,708, and to enter a judgment in favor of plaintiffs on the general verdict of \$107,858.-44, with interest from the day it was rendered; and the plaintiff in error is to recover costs in this court.

If, however, the defendants in error shall, within a reasonable time, during the present term of this court, file in the circuit court a remittitur of so much of the judgment of that court in their favor as is based on the special verdict, and produce here a certified copy of the remittitur, the judgment of that court will be affirmed.

See 1 Otto.

THOMAS J. HAINES ET AL., Trustees of
THE VICKSBURG BAPTIST CHURCH, *Appls.*,

v.

CHARLES CARPENTER, *Exr.*, ET AL.

(See S. C., 1 Otto, 254-257.)

Suit to enjoin state court—injunction.

1. A suit in a Federal Court to enjoin litigation in the State Courts, and to bring all the litigated questions before the Federal Court, cannot be sustained.
2. A writ of injunction cannot be granted by a Federal Court, to stay proceedings in a State Court, except where specifically provided for by the Bankrupt Law.

[No. 100.]

Submitted Jan. 3, 1876. Decided Jan. 17, 1876.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Mr. Joseph Casey, for appellants, relied on *Payne v. Hook* (74 U. S., 425, XIX., 260). (No counsel appeared for appellee.)

Mr. Justice Bradley delivered the opinion of the court:

Celia A. Groves, of Madison Parish, Louisiana, by her will dated the 27th of January, 1872, among other things bequeathed to the Baptist Church in the City of Vicksburg, the plantation on which she lived, except one hundred and fifty acres, which were designated; and expressed a desire that the church should hold it, and not sell it, and that the proceeds should be employed to educate young men for the ministry. She appointed her brother-in-law, Charles Carpenter, her universal legatee and executor, giving him seizure of the estate to carry out the provisions of the will and the purposes of the trust. The will was admitted to probate on the 16th of March, 1872, by the parish judge; and Carpenter assumed the duties of executor, and took possession of the estate.

The bill in this case was filed in September, 1872, by the appellants, as Trustees of the Vicksburg Baptist Church, of Vicksburg in Mississippi, a body corporate of that State, alleging that said church was the one intended by the will, and charging various matters of complaint upon which relief is sought. The defendants are, first, the executor, Charles Carpenter; second, one Elias S. Dennis, who claims to have been a partner of testatrix; third, Mary Stout, Julia Trezevant and others, who claim to be the heirs of the testatrix; fourth, Richard H. Groves and others, who claim to be the heirs of her deceased husband, George W. Groves; fifth, John A. Klein and others, legatees named in the will.

The bill states that Carpenter is unfit and incompetent to manage and control the estate, and that he lets it run to waste; and asks that he be removed, and a receiver appointed.

It further states that Dennis has instituted a suit against the executor in the Thirteenth District Court of Louisiana, claiming to have been a partner of testatrix, and that a large amount is due him as such, with a view of ab-

sorting the succession by a judgment; and that the executor is colluding and combining with him, and asks that they be enjoined from continuing such combination.

It also states that Mary Stout, Julia Trezevant and others, claiming to be the testatrix's heirs, have instituted a suit in the Parish Court of Madison Parish, alleging that the bequest to the church is void, and praying that it may be declared void, for various reasons, amongst others, as being uncertain, against the laws of Louisiana, and attempting to establish a perpetuity; and that the complainants answered the petition in said suit, which is still pending.

And further, that Richard H. Groves and others, alleging themselves to be the heirs of George W. Groves, the testatrix's husband, have also commenced a suit in said Thirteenth District Court, claiming that the property bequeathed belonged to him and that the will is null and void, and praying that it may be declared void.

In view of these various proceedings, the bill claims that the case presents a multiplicity of suits, sufficient to induce a court of equity to interfere for the protection of the complainants. It also alleges that full and adequate relief cannot be had unless the circuit court take cognizance of all the questions presented by said suits, and of the whole subject-matter of the succession, and of all suits and litigations affecting it. It also alleges that such local prejudices exist against the church, that it cannot obtain justice in the state courts.

The bill prays that the executor may account for all moneys received by him from the succession, and for a reference to a master to ascertain and settle all claims against the estate, and that a receiver may be appointed to take charge of the estate; that the will may be declared valid; that the complainants may be put into possession of the plantation; that the executor may be removed; and that an injunction may issue to enjoin and restrain the defendants from further prosecuting the said suits, or any other suits or litigation in the premises.

This bill was dismissed by the court below on demurrer; and from that decree this appeal was taken.

A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents some matters of equitable consideration, they are so mixed up with others of a different character, or which cannot be entertained by the Circuit Court of the United States, and which constitute the main object and purpose of the suit, as to make the bill essentially bad on demurrer. In the first place, the great object of the suit is to enjoin and stop litigation in the State Courts, and to bring all the litigated questions before the circuit court. This is one of the things which the Federal Courts are expressly prohibited from doing. By the Act of March 2, 1793, 1 Stat. at L., 335, it was declared that a writ of injunction shall not be granted to stay proceedings in a State Court. This prohibition is repeated in sec. 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the Bankrupt Law. This objection alone is sufficient ground for sustaining the demurrer to the bill. In the next place, the claim that the court ought to interfere on account of multiplicity of suits is

manifestly unfounded. Only three suits are specified for this purpose in the bill, and each of these has a distinct object, founded on a distinct ground, and is instituted by a distinct class of claimants, who had a perfect right to institute the suit they did. The State Courts have full and ample jurisdiction of the cases, and no sufficient reason appears for interfering with their proceedings.

The decree of the Circuit Court is affirmed.

Cited—109 U. S., 607; 4 Hughes, 353; 2 McCrary, 476.

JOSEPH MOORE. *App't*,

v.

UNITED STATES.

(See S. C., 1 Otto, 270-274.)

Comparison of handwritings—rules of evidence in Court of Claims.

1. The Court of Claims, like a court of equity, may determine the genuineness of a signature by comparing it with other handwriting of the party.

2. Where Congress has not provided, and no special reason demands a different rule, the rules of evidence as found in the common law ought to govern the action of the Court of Claims.

3. If a paper, admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it.

[No. 81.]

Argued Dec. 13, 14, 1875. Decided Jan. 17, 1876.

APPEAL from the Court of Claims.

The court below found the facts to be as follows:

The petitioner claims the net proceeds of 26½ bales of upland cotton, and the court finds the facts to be:

That the petitioner, a British subject, owned and was possessed of said 26½ bales, stored in a warehouse in St. Joseph, La.; that, on a certain day it was seized by the United States, by the boats of their marine brigade under the command of Colonel Ellett, and taken from the possession of the petitioner and sold by the United States, and the net proceeds thereof, amounting to the sum of \$5,780, paid into the Treasury; that, after said seizure and while the said cotton was in a boat of the marine brigade, the said petitioner sold the said cotton, as appears by the certificate or paper writing, marked A; that the original of said paper writing, marked A, was proved in court by a comparison, made by the judges of the court, of the handwriting and signature of said paper writing with the handwriting and signature of the petitioner in another paper writing, in evidence for other purposes in this cause.

At the hearing, the petitioner offered his own deposition, taken in May, 1872, to prove that he was induced to make the sale of his cotton, above stated, to Cummings, a sutler on board the boat on which the cotton after its seizure was loaded, by the duress of his cotton and the connivance of the officer who seized it, with Cummings, and the deposition was not admitted as evidence, but rejected.

NOTE.—Evidence; proof of handwriting or signature. See note to Rogers v. Ritter, 79 U. S., 222, 417.

On the facts stated, it was ordered that the petition in this case be dismissed.

Messrs. Bartley & Casey, for appellants:

1. The court erred in admitting proof of execution of the papers in question by comparison of handwriting.

2. If comparison be admissible to prove the execution, it could only be by experts; and it is not shown that the Judges of the Court of Claims, or any of them, are such experts.

3. That the mode of proof adopted deprived the claimant of the right of cross-examination, or of testing the knowledge and accuracy of the witnesses by whom the facts were to be established.

Strother v. Lucas, 6 Pet., 763; *Rogers v. Ritter*, 12 Wall., 821 (79 U. S., XX., 418); *Martin v. Taylor*, 1 Wash. C. C., 1; *McCorkle v. Binns*, 5 Binn., 349; *Bk. v. Whitehill*, 10 S. & R., 110; *Bk. v. Haldeman*, 1 Pa., 161; *Baker v. Haines*, 6 Whart., 284; *Depue v. Place*, 7 Pa., 428; *People v. Spooner*, 1 Den., 343; *Titford v. Knott*, 2 Johns. Cas., 211; *Jackson v. Phillips*, 9 Cow., 94; *Wilson v. Kiriland*, 5 Hill, 182; *Smith v. Walton*, 8 Gill., 77.

Same in Ky., *McAllister v. McAllister*, 7 B. Mon., 269.

Same in Ala., *Little v. Beasley*, 2 Ala., 703.

Same in R. I., *Kinney v. Flynn*, 2 R. I., 819; 1 Greenl. Ev., sec. 576, *et seq.*

Mr. Edwin B. Smith, Asst. Atty-Gen., for appellee:

The execution of the paper was properly proved.

Comparison of hands has always been considered a legitimate mode of determining as to the authenticity of a signature.

In the opinion, *Judge Loring* speaks of it as the method sanctioned in *Medway's* case, 6 Court of Claims, 421, and "The law of the court." It would be more accurate to say that it was adopted, because found, on examination, to be the law of the land.

See the cases cited in 6 Court of Claims, 429, 432; also, *Henderson v. Hackney*, 16 Ga., 521; *McCorkle v. Binns*, 5 Binn., 349; *Lyon v. Lyman*, 9 Conn., 55; *Adams v. Field*, 21 Vt., 256; *Homer v. Wallis*, 11 Mass., 809; *Moody v. Rowell*, 17 Pick., 490; *Richardson v. Newcomb*, 21 Pick., 815; *Chandler v. Le Barron*, 45 Me., 534.

Mr. Justice Bradley delivered the opinion of the court:

According to the facts found in this case, we think no error was committed by the court below. It appeared from a document, purporting to be signed by the claimant, that he had sold the cotton in question on the 12th of December, 1863 and, therefore, that he was not entitled to claim the proceeds thereof from the United States. The only question of importance is, whether the signature to this document was properly proved. The court compared it with his signature to another paper in evidence for other purposes in the cause, respecting which there seems to have been no question; and from that comparison adjudged and found that the signature was his. Had the court a right to do this? The Court of Claims, like a court of equity or admiralty, or an ecclesiastical court, determines the facts as well as the law; and the question is, whether they may determine the genuineness of a signature by comparing it with other handwriting of the party. By the general rule of the common law, this cannot be done either by the court or a jury; and that is the general rule of this country, although the courts of a few States have allowed it, and the Legislatures of others, as well as of England, have authorized it. In the ecclesiastical courts, which derived their forms of proceeding from the civil law, a different rule prevails. The questions are: by what law is the Court of Claims to be governed in this respect? May it adopt its own rules of evidence? Or is it to be governed by some system of law? In our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many Acts of Congress could not be understood without reference to the common law. The great majority of contracts and transactions which come before the Court of Claims for adjudication are permeated and are to be adjudged by the principles of the common law. Cases involving the principles of the civil law are the exceptions. We think that where Congress has not provided and no special reason demands a different rule, the rules of evidence as found in the common law ought to govern the action of the Court of Claims. If a more liberal rule is desirable, it is for Congress to declare it by a proper enactment.

But the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. It is not distinctly stated in this case that the writing used as a basis of comparison was admitted to be in the claimant's hand; but it was conceded by counsel that it was, in fact, the power of attorney given by him to his attorney in fact, by virtue of which he appeared and presented the claim to the court. This certainly amounted to a declaration, on his part, that it was in his hand; and to pretend the contrary would operate as a fraud on the court. We think it brings the case within the rule, and that the Court of Claims had the right to make the comparison it did.

The decree is affirmed.

Dissenting, *Mr. Justice Field*.

Cited—96 U. S., 89.

M. M. WELTON, *Plff. in Err.*,

v.

STATE OF MISSOURI.

(See S. C., 1 Otto, 275-283.)

License Tax, what on—Mo. law unconstitutional—effect of inaction of Congress upon the subject.

*1. A license tax required for the sale of goods is in effect a tax upon the goods themselves.

2. A statute of Missouri which requires the pay-

*Head notes by *Mr. Justice FIELD*.

ment of a license tax from persons who deal in the sale of goods, wares and merchandise which are not the growth, produce or manufacture of the State, by going from place to place to sell the same in the State, and requires no such license tax from persons selling in a similar way goods which are the growth, produce or manufacture of the State, is in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several States.

8. That power was vested in Congress to insure uniformity of commercial regulation against discriminating state legislation. It covers property which is transported as an article of commerce from foreign countries, or among the States, from hostile or interfering state legislation until it has mingled with and become a part of the general property of the country, and protects it even after it has entered a State, from any burdens imposed by reason of its foreign origin.

4. The inaction of Congress in prescribing rules to govern interstate commerce, is equivalent to its declaration that such commerce shall be free from any restrictions.

[No. 180.]

Submitted Dec. 13, 1875. Decided Jan. 17, 1876.

IN ERROR to the Supreme Court of Missouri. The case is stated by the court.

Messrs. S. M. Smith, Samuel Knox and James S. Botsford, for plaintiff in error:

The 1st, 2d, 7th and 8th sections of the Act of the Legislature of Missouri, concerning peddlers, approved Mar. 5, 1845, as amended by the Rev. Stat. of 1865, are in conflict with that provision of section 8 of the 1st article of the Constitution of the United States which ordains that "The Congress shall have power to regulate commerce with foreign nations and among the several States."

Crow v. Mo., 14 Mo., 290; *State v. North*, 27 Mo., 464; 2 Story, Const., 4th ed., secs. 1056-1076; *Corfield v. Coryell*, 4 Wash. C. C., 371; *Gibbons v. Ogden*, 9 Wheat., 1; *Brown v. Md.*, 12 Wheat., 419; *Almy v. Cal.*, 24 How., 169 (65 U. S., XVI., 644); *Crandall v. Nev.*, 6 Wall., 35 (73 U. S., XVIII., 745); *Woodruff v. Parham*, 8 Wall., 123 (75 U. S., XIX., 382); *Hinson v. Lott*, 8 Wall., 148 (75 U. S., XIX., 387); *Ward v. Md.*, 12 Wall., 418 (79 U. S., XX., 449); *State Freight Tax* case, 15 Wall., 282 (82 U. S., XXI., 146); *R. R. Co. v. Richmond*, 19 Wall., 589 (86 U. S., XXII., 176).

Messrs. Jno. Hockaday, Atty-Gen., of Missouri, and **A. H. Buckner**, for defendant in error:

It is insisted by appellant, that the Act regulating peddlers, already cited, is in conflict with section 8, article 1 of the Constitution of the United States, which provides that Congress shall have power, "to regulate commerce with foreign nations, and among the several States," etc.

This position, we admit, would at once dispose of the case, if the Act regulating peddlers was susceptible of being construed as providing a system of taxation discriminating prejudicially against articles manufactured beyond the limits of Missouri. But such is not the intent of the Act, and its operation cannot to any extent have that effect.

See, *Osborne v. Mobile*, 16 Wall., 479 (83 U. S., XXI., 470).

The object of the enactment, as appears from its title and from each of its provisions, is sim-

ply to regulate a calling or occupation. It is simply an Act providing for taxing and licensing peddlers, which the State clearly has a right to do.

Nathan v. La., 8 How., 78; *Cumming v. Savannah*, R. M. Charl., 26; *Raguet v. Wade*, 4 Ohio, 114; *Beal v. State*, 4 Blackf., 106; *Austin v. State*, 10 Mo., 598; *Simmons v. State*, 12 Mo., 268; *License Cases*, 5 How., 588, 504; *Smith v. Turner*, 7 How., 288; 55 Mo., 286; *Woodruff v. Parham*, 8 Wall., 123 (75 U. S., XIX., 382).

The Act in question in no respect imposes a tax upon property. It does not prevent nor seek to prevent the importation of any kind of goods whatever; nor does it impose any conditions upon or place any impediment in the way of a free interchange of commodities with other States or countries.

This Act does not impose a tax upon property; it simply taxes a business, and none the less so because the tax is graded according to the magnitude of that business.

Mr. Justice Field delivered the opinion of the court:

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the validity of a statute of that State, discriminating in favor of goods, wares and merchandise which are the growth, product or manufacture of the State, and against those which are the growth, product or manufacture of other States or countries, in the conditions upon which their sale can be made by traveling dealers. The plaintiff in error was a dealer in sewing-machines, which were manufactured without the State of Missouri, and went from place to place in the State selling them without a license for that purpose. For this offense he was indicted and convicted in one of the circuit courts of the State, and was sentenced to pay a fine of \$50, and to be committed until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

The statute, under which the conviction was had, declares that whoever deals in the sale of goods, wares or merchandise, except books, charts, maps and stationery, which are not the growth, produce or manufacture of the State, by going from place to place to sell the same, shall be deemed a peddler; and then enacts that no person shall deal as a peddler without a license, and prescribes the rates of charge for the licenses, these varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. No license is required for selling in a similar way, by going from place to place in the State, goods which are the growth, product or manufacture of the State.

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

The general power of the State to impose

NOTE.—Power of Congress to regulate commerce; state licenses; power of State to tax commerce. See note to *Gibbons v. Ogden*, 22 U. S. (9 Wheat.), 1; and note to *Brown v. Maryland*, 25 U. S. (12 Wheat.), 419.

taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license.

In the case of *Brown v. Md.*, 12 Wheat., 425, 444, the question arose, whether an Act of the Legislature of Maryland, requiring importers of foreign goods to pay the State a license tax before selling them in the form and condition in which they were imported, was valid and constitutional. It was contended that the tax was not imposed on the importation of foreign goods, but upon the trade and occupation of selling such goods by wholesale after they were imported. It was a tax, said the counsel, upon the profession or trade of the party when that trade was carried on within the State, and was laid, upon the same principle with the usual taxes upon retailers or innkeepers, or hawkers and peddlers, or upon any other trade exercised within the State. But the court in its decision replied, that it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance; that a tax on the occupation of an importer was a tax on importation, and must add to the price of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself. Treating the exaction of the license tax from the importer as a tax on the goods imported, the court held that the Act of Maryland was in conflict with the Constitution; with the clause prohibiting a State, without the consent of Congress, from laying any impost or duty on imports or exports; and with the clause investing Congress with the power to regulate commerce with foreign nations.

So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation, thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers, is valid under the Constitution of the United States. It was contended in the state courts and it is urged here, that this legislation violates that clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several States. The power to regulate, conferred by that clause upon Congress, is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall

be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. "It was regulated," says *Chief Justice Marshall*, in delivering the opinion in *Brown v. Maryland*, "by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal Government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." *Brown v. Maryland* [*supra*].

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by traveling dealers of goods which are the growth, product or manufacture of other States or countries, it may require such

license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.

There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. A similar difficulty was felt by this court, in *Brown v. Maryland* in drawing the line of distinction between the restriction upon the power of the States to lay a duty on imports, and their acknowledged power to tax persons and property; but the court observed, that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them; but that, as the distinction exists, it must be marked as the cases arose. And the court, after observing that it might be premature to state any rule as being universal in its application, held that when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import and become subject to the taxing power of the State; but that, while remaining the property of the importer in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports prohibited by the Constitution.

Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The Act of Missouri encroaches upon this power in this respect and is, therefore, in our judgment, unconstitutional and void.

The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that com-

merce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri.

The views here expressed are not only supported by the case of *Brown v. Md.*, already cited, but also by the case of *Woodruff v. Parham*, 8 Wall., 123 [75 U. S., XIX., 382], and the case of *The State Freight Tax*, 15 Wall., 282 [82 U. S., XXI., 146]. In the case of *Woodruff v. Parham*, Mr. Justice Miller, speaking for the court, after observing, with respect to the law of Alabama then under consideration, that there was no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case was not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity, said, "But a law having such operation, would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore, void."

The judgment of the Supreme Court of the State of Missouri must be reversed and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day.

Cited—93 U. S., 108; 95 U. S., 470; 100 U. S., 438, 678, 679; 102 U. S., 125, 708; 108 U. S., 350; 106 U. S., 485; 107 U. S., 697, 702; 6 Sawy., 209, 379, 383; 19 Kan., 130; 97 Ill., 334; 28 Ohio St., 532; 51 Wis., 200; 71 Ala., 508; 46 Am. Rep., 352; 95 Ind., 12; 48 Am. Rep., 698; 56 Iowa, 185; 43 Am. Rep., 117; 19 Kan., 80; 27 Am. Rep., 100, 101.

THE WESTERN UNION TELEGRAPH COMPANY, App't.,

THE WESTERN AND ATLANTIC RAILROAD COMPANY.

(See S. C., 1 Otto, 282-291.)

Construction of agreement for use of telegraph wire—equitable relief.

1. Where a Telegraph Company agreed to set apart, on its line of poles along a railroad, a telegraph wire for the exclusive use of a Railroad Company, the ownership of the wire, posts and instruments was in the Telegraph Company and the Railroad Co., could only have such use of it as was required by the terms of the agreement, and must comply with such terms, in order to retain the right to such use.

2. The Telegraph Company, in order to prevent a multiplicity of suits for every violation of the agreement, and to have an accounting, may have relief in equity.

[No. 61.]

Argued Dec. 1, 2, 1876. Decided Jan. 24, 1876.

APPEAL from the Circuit Court of the United States for the Northern District of Georgia.

The case is stated by the court.

This cause was commenced in the District Court for the Northern District of Georgia, by the appellant; the district court at that time having the powers of a circuit court. The cause was pending in that court at the date of the Act, June 4, 1872, 17 Stat. at L., 218, creating a circuit court in that district.

Messrs. J. Hubley Ashton and Grossenor Porter Lowrey, for appellant.

Messrs. Jos. E. Brown, Julius L. Brown and B. H. Hill, for appellee.

Mr. Justice Miller delivered the opinion of the court:

The State of Georgia, which was the sole owner of a railroad called the Western and Atlantic Railroad, desiring the use of a telegraph for the purposes of the road along its line, an instrument of writing was signed on that subject by William Orton, President, on behalf of the Western Union Telegraph Company, and by Foster Blodgett, Superintendent of the railroad, was approved by Rufus B. Bullock, Governor, and countersigned by H. C. Oarsen, Secretary of the Executive Department. This instrument was dated August 18, 1870.

The substance of the agreement was, that the Company should put up and set apart on its line of poles already there, along said railroad, a telegraph line for the exclusive use of the railroad; equip it with as many instruments, batteries and other necessary fixtures, as might be required for use in the railroad stations; run the wire into all the offices along the line of the road and put the same in complete working order. Other provisions of the agreement related to the terms on which the officers of the road might transmit and receive messages through the connecting lines of the Company; to the right of way of the Telegraph Company along the line of the road; and to other matters regulating the use of the wire, and compensation for it. The 6th article of the agreement bound the State to pay the cost of constructing the wire, and of equipping it at railroad stations not already supplied with instruments, batteries and other necessary fixtures, as soon as this cost could be ascertained.

Shortly after the wires were put up and the instruments in working order, the Governor of the State leased the road for twenty years under authority of an Act of the Legislature, to certain persons who became a body corporate by the name of "The Western and Atlantic Railroad Company."

The instrument witnessing the contract, professed to grant, convey and lease to the Western and Atlantic Railroad Company, "the Western and Atlantic Railroad, which is the property of the State of Georgia, together with all its houses, workshops, depots, rolling stock and appurtenances of every character, for the full term of twenty years."

The Railroad Company took possession of the road and its appurtenances under the lease, including the wire and batteries and instruments put on the road and in its offices by the Telegraph Company under the contract with the State; but having this possession, refused to pay for the transmission of messages over connecting lines according to the terms of the contract, and claimed that it was not bound thereby; and that, in fact, the true construction of that agreement was that the State had bought and paid for the wire and instruments, and owned them, it, and as lessee of the State, the Company had the right to control and use them without any liability to the Telegraph Company.

The bill of complaint of the Telegraph Company, after stating the refusal of the Railroad Company, after stating the refusal of the Railroad

Company to recognize its rights in any respect; while it insisted on using the wire and apparatus, refusing also to allow complainants any use of the wires and instruments in its offices and depots, alleges that these considerations induced complainant to treat as revoked and withdrawn, all power and privilege on the part of the defendant to use said wire and apparatus, or to receive compensation therefor; and that the complainant, seeking to recover possession of them, had been hindered and obstructed by the defendant in so doing. The bill prays that the defendant be enjoined from using said wire, from hindering or obstructing plaintiff in the use of it, or in severing it from all the offices of defendant, and for such other and further relief as the nature of the case requires.

Defendant in its answer denies that the contract between the Telegraph Company and the State is valid, being without authority of law; denies that, if valid, it, as lessee of the railroad, is bound by its terms; and asserts that, by the true construction of the contract, the State became the purchaser and owner of the wire and instruments, and that the Company succeeded to this ownership without being bound by the other terms of the agreement.

The Railroad Company also filed a cross-bill, setting up this view of its rights, and praying an injunction against the Telegraph Company to restrain it from interfering with the use of the wire and apparatus so acquired from the State.

The district court dismissed this cross-bill on demurrer, and on hearing the original bill of complainants on the answer and evidence, decreed that the wire and instruments in question are the property of the State of Georgia, and are included in the lease to the Railroad Company; and that this Company is not bound by the terms of the contract in other respects, unless adopted by it; and, therefore, dismissed the bill.

We differ with the district court as to the construction of the instrument. We do not think that the State simply bought a wire and batteries and other instruments, and became absolute owners of them; on the contrary, we think that the contract was for the use of a wire and instruments of the Telegraph Company.

The language of the first covenant of the Telegraph Company is, that it agrees "to set apart on its line of poles along said railroad a telegraph wire for the exclusive use of said party of the second part." The further covenants are all consistent with this. The contract for the use of this wire in connection with the others, and for the use of one of the wires already there when this shall be disabled, the fact that it is placed upon the poles of the Company already in use for two other wires, the agreements regulating the offices, and, in short, the whole frame of the contract, show that the wire, the poles, the instruments were the property of the Telegraph Company, with exclusive use of this wire transferred to the railroad.

This view is perfectly consistent with the idea that the State should pay the cost and expense of the additional wire and instruments rendered necessary by this agreement for its exclusive use, which does not prove that anything more than this right to exclusive use passed to the State.

If this be true, the Railroad Company, tak-

ing possession of this wire and instrument under claim of right from the State, must use it on the terms which bound the State, or not use it at all.

The ownership being in the Telegraph Company, the road could only have such use of it, lawfully, as it acquired from the State; and the right of the State to the use of it is governed by the terms of the agreement.

It is said that the contract between the State and the Telegraph Company is void, because the superintendent and the Governor had no power to make it, and because it is oppressive and extortionate.

We do not decide whether this be so or not. Whenever the Railroad Company or the State shall cease to use the wire, shall abandon the contract and leave the instruments severely alone, and the complainant shall then seek to compel compliance with the contract, after that it will be time to decide that question; but so long as this Company, by the use of the wire and the apparatus, gets the benefit of the contract, it must also abide by the terms in other respects.

We are embarrassed in this view of the subject by the unskillful character of the bill. The relief it seeks is the very last one would think of, namely: to enjoin the Railroad Company from the use of a wire and battery and instruments running along its line, and fixtures in its offices and depots, where they may remain until it may be the pleasure of the complainant to take them away. The right to compensation for what the complainant has suffered by the failure of defendant, while using the wire, to comply with the covenants of the State, can be understood, and the right of defendant to use the wire, when performing the covenants of the State, can be understood; the right to a rescission of the contract, if either party prayed for it, can be understood; but this right which each claims, that it shall be let alone by the other to do as it pleases in regard to this wire, is very difficult to understand.

Plaintiff, in the petition, treats as revoked, the power and privilege of defendant to use the wire and instruments. Is this an abandonment of the contract by the plaintiff?

But there is in the bill a prayer for such other and general relief as the case may require. There is also the following stipulation after the pleadings are all in, which relieves us of much difficulty:

"It is agreed by counsel, that if the use of the wire by the defendant is affected by the contract entered into between the complainant and the State (which contract is copied in the exhibit to the bill) in such manner as that the terms of said contract must be observed and complied with by defendant in order to retain the right to such use, the case is one proper for reference to the master to take an account unless the court should adjudge that there is no right in complainant to relief in equity."

Now, we are of opinion that the use of the wire by the defendant is affected by the contract between complainant and the State, in such manner that if it chooses to use it, it must comply with its terms, as we have already said.

We are also of opinion that to prevent multiplicity of suits, and to have an accounting, instead of bringing a suit on every specific viola-

tion of the covenants of the State, complainant has a right to relief in equity.

The decree of the Circuit Court is, therefore, reversed, with directions to refer the case to a master to state an account on the terms of the contract between the State and the Telegraph Company, as between the complainant and defendant, for the time defendant has used the wires, batteries and equipments put up under that contract, and to render a decree for that amount.

Dissenting, *Mr. Justice Field.*

JOHN FORSYTHE, *Appt.*,

v.

MARK KIMBALL, Assignee of THE MUTUAL SECURITY INSURANCE COMPANY.

(See S. C., 1 Otto., 291-294.)

Parol evidence to vary terms of a bill or note.

1. Parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, or add to or subtract from the absolute terms of the written contract.

2. The rule is the same in equity as at law.

[No. 126.]

Submitted Jan. 14, 1876. Decided Jan. 24, 1876.

A PPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. W. C. Goudy, for appellant.

Messrs. Jno. L. Thompson and Norman Williams, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

The case made by the bill is as follows:

The appellant, John Forsythe, negotiated a loan of \$5,000 from the Insurance Company. He had four brothers. For \$4,000 of the amount loaned, he and each of his brothers gave a separate note of \$800. Ten notes of \$200 each, signed by all the parties, were given for the interest, which was to be paid semi-annually, at the rate of ten per cent. per annum. The notes all bore date on the 5th of January, 1869. Those for the principal were to be paid at the end of five years. At the same time, Robert H. Forsythe, one of the brothers, gave for the residue of the loan his note for \$1,000, of the same date with the five notes of \$800 each. He also then gave his ten notes of \$50 each for the interest, which was at the same rate as that upon the notes of \$800, and payable at the same times. The notes were all made payable to J. Y. Scammon, or order.

Four thousand dollars of the money loaned was invested in real estate, and the title taken to the five brothers who had executed the five notes of \$800. They secured those notes and the ten interest notes by a mortgage on the premises. The \$1,000 for which Robert H. Forsythe gave his notes, was invested in land which was

NOTE.—Party to bill, note or check cannot vary its contract by parol; parol evidence admissible for *what* purpose. See note to *Bank of U. S. v. Dunn*, 31 U. S. (6 Pet.), 51.

conveyed to him and he secured his notes by a mortgage upon it. Scammon was an active officer of the Insurance Company. When the loan was negotiated and consummated, the appellant, as an inducement to the Company to make it, assumed and promised by parol to pay all the notes above mentioned, both for principal and interest. Upon receiving the securities, Scammon indorsed and transferred them to the Insurance Company. The appellant insists that the \$5,000 was lent by the Company, and not by Scammon, and that the loan was to him, and in no part to the other parties who executed the notes. The appellant paid all the interest notes, amounting to \$1,250, which fell due prior to the 9th of October, 1871. His brothers are irresponsible, and paid nothing. On the day last named the great Chicago fire occurred. He held fire-policies issued by the Company upon buildings which were consumed. The Company thus became indebted to him to the amount of \$11,000. His losses were settled and adjusted at that sum. No part of it has been paid. On the 28th of April, 1873, his four brothers conveyed to him their rights and titles to the several mortgaged premises.

He seeks to have the amount due to him from the Insurance Company set off against all the notes, so far as shall be necessary to satisfy and extinguish the latter.

The answer of the assignee denies that the money in question was borrowed from the Insurance Company, and avers that the Company bought the notes from Scammon for a valuable consideration.

The court decreed that the appellant was entitled to a set-off as claimed for the amount of his note of \$800, and for his proportionate share of the several interest notes which he had executed. From this decree he appealed to this court.

Upon looking into the record, we find that no testimony was taken upon either side but that of the appellant, which was taken for himself.

In his deposition are the following questions and answers:

“Q. Did you borrow any sum of money from the Mutual Security Insurance Company in the year 1869? If so, state when you borrowed the money, and the amount.

A. I borrowed the sum of \$5,000 from said company on or about the 5th day of January, 1869.

Q. What officer of the Mutual Security Insurance Company besides Scammon did you have any conversation with, in reference to this loan, if any?

A. Scammon was the only officer of the Company.

Q. Do you know whether the money that was paid for this land originally was the money of the company, or the money of Scammon?

A. Scammon paid over the money; but whether it was the Company's money or Scammon's, that I don't know.

19 Q. Why were the notes made payable to Scammon?

A. Because the officers of the Company wanted Scammon to take the responsibility of making the loan. He was managing the notes of the Company; and he was willing to indorse the
See 1 OTTO.

notes, knowing all the parties, and looking to me to be the responsible party.

20 Q. Did you make any agreement or promise to pay these notes, or any part of them? And, if so, what agreement of promise did you make about it?

A. I agreed with Scammon that I would pay the notes, and be responsible for them.

21 Q. How much of them?

A. All of them.”

This is all the deposition contains which is material to the points in controversy between the parties.

The burden of proof rests upon the appellant. His own testimony is weak and inconclusive. If the loan was made by the Company, the reason given for making the notes payable to Scammon is improbable. Why should he take notes to himself for money which did not belong to him, and then assume the hazards of an indorser in transferring them to the Company? No sufficient reason has been given for this, nor can one readily be imagined. It is a significant fact that the appellant called neither of his four brothers nor Scammon as a witness. Their testimony, if concurrent, would have been conclusive. It does not appear that there would have been any difficulty in his procuring it. This warrants a presumption against him. If the loan was by and for him alone, why did he execute but one of the \$800 notes, his brothers each executing one of the others? Why was the title to the real estate bought with the \$4,000, taken to him and them jointly, and not to him alone. Why did Robert H. Forsythe alone give his note for the \$1,000? And why was the title to the real estate, in which that money was invested, taken to Robert alone, without the name of the appellant appearing upon the papers? His allegations have no support except from his own testimony, and that is contradicted by every material fact developed in the record which bears upon the subject. The case fails upon the evidence.

It must fail also upon a well settled principle of law.

If it were clearly proved, as alleged, that the entire sum of \$5,000 was lent to the appellant, and that he expressly agreed at the time the securities were executed to pay back, himself, the entire amount at the end of five years, and to pay the interest in the meantime as stipulated, such proof would be wholly inconsistent with the contract of the parties as reduced to writing, and would, therefore, be unavailing either for or against him. “It is a firmly settled principle, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, or add to or subtract from the absolute terms of the written contract.” 2 Para. Bills & Notes, 501; *Specht v. Howard*, 16 Wall., 564 [88 U. S., XXI., 848]. It is not claimed that there was either fraud, accident or mistake touching the securities that were executed.

Under these circumstances, the rule is the same in equity as at law. 2 Story, Eq., sec. 1531.

It is neither alleged nor proved that the mortgage given by the appellant and his brothers was not sufficient to secure him against their

shares of the notes executed jointly by him and them. Their shares of the premises have been conveyed to him.

The indemnity is, therefore, in his own hands.

All was given below to the appellant to which in any view of his case he can be deemed entitled.

The decree of the Circuit Court is affirmed.

Cited—25 U. S., 451; 104 U. S., 20; 106 U. S., 254; 31 Oeb. St., 20; 44 Wis., 522; 30 Gratt., 664; 32 Am. Rep., 656; 44 Wis., 522; 28 Am. Rep., 656.

**THE MAYFLOWER, THOMAS PITTS, EXR.
of H. NORTON STRONG, Deceased, Claimant,
Appl.,**

v.

**THE STEAMER DOVE, THE RIVER AND
LAKE SHORE STEAMBOAT LINE, OWNERS.**

(See S. C., "*The Dove*," 1 Otto, 381-389.)

*Cross-bill in collision action—dismissal of—case
decided on the facts.*

1. Where the respondent claims that the collision was occasioned wholly by the fault of the vessel of the libellant and claims a decree for the damages suffered by his own vessel, then he must file a cross-libel.

2. A final decree dismissing the libel in the cross-suit determines that suit, but it does not dispose of the issues of law or fact involved in the original suit; every issue in the original suit is open to the parties, just the same as if no cross-libel had ever been filed.

3. Propeller held in fault for a collision with a steamer in St. Clair River, in a dark and foggy night.
[No. 64.]

Argued Dec. 3, 6, 1875. Decided Jan. 24, 1876.

A PPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The case is stated by the court.

Messrs. D. B. Duffield, F. H. Canfield and G. V. N. Lothrop, for appellant.

Messrs. H. B. Brown, Wm. N. Moore and Ashley Pond, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Efforts, sometimes of a persistent character, are made in controversies of the kind, to establish a theory, which, if true, would show that the respective vessels of the parties never collided, even when it is admitted that the collision did occur at the time and place alleged in the libel, and that the vessel of the complaining party became a total loss. Such efforts are useless, as it is hardly to be expected that the attention of the court, if accustomed to such investigations, can be diverted from the great inquiry in such a case, which of the parties, if either, is responsible for the loss occasioned by the disaster.

Compensation is claimed by the owners of the steamer Dove, for damages received by the steamer in a collision, which occurred in St. Clair River, May 31, 1869, between the steamer and the propeller Mayflower, about 11 o'clock in the evening of that day, in which the propeller struck the steamer on her port bow, and caused such injuries to the steamer that her master found it necessary, in order to prevent her from sinking in deep water, to port her

helm and strand her on the Canada channel-bank of the river.

Process was served, and the owner of the propeller appeared and filed an answer. He also filed a cross-libel, in which he charged that the collision was occasioned by the fault of the steamer; and the owners of the steamer appeared and filed an answer to the cross-libel, denying the charge that the steamer was in fault, and re-affirming all the material allegations of the original libel.

Testimony was taken on both sides; and, the parties having been fully heard, the district court entered a decree in favor of the owners of the steamer for the sum of \$14,114.63, with interest and costs, as set forth in the decree, and dismissed the cross libel with costs, at the same time the decretal order was entered in favor of the libellants in the original suit promoted by the owners of the steamer; from which decree dismissing the cross-libel no appeal was ever taken by either party.

Seasonable appeal to the circuit court was taken by the owner of the propeller, from the decree of the district court in the original suit, and further testimony was there taken before the final hearing. On the part of the propeller, the same views were maintained in the circuit court as those urged in the district court; but the owners of the steamer submitted an additional proposition to the effect that, inasmuch as no appeal had been taken from the decree of the district court in the cross-libel, the libellant in that suit was estopped to deny the charge in the answer to the cross-libel, that the collision was occasioned wholly by the fault of the propeller.

Both parties were again heard, and the circuit court affirmed the decree of the district court; and the respondent in the original suit appealed to this court. His principal propositions here are, that the collision occurred on the Canada side of the river, and that the steamer was wholly in fault.

Opposed to the first proposition, it is insisted by the libellant that the collision took place on the American side of the river; that the propeller was wholly in fault; and that her owner is estopped to deny that allegation, because no appeal was taken from the decree of the district court dismissing the cross-libel.

Special reference is made in the argument to the case of *Chamberlain v. Ward*, 21 How., 554 [62 U. S., XVI., 213], as tending to support the proposition of estoppel; but the court here is of the opinion that nothing is found in that case which has any such tendency. Two remarks will be sufficient to show that the inference drawn from that case is not well founded: (1) That no cross-libel was filed in that case. Due process was issued in the original suit, and the respondents appeared and filed an answer, and the parties entered into an agreement that the answer in the primary suit should also be considered and operate as a libel in the cross-action. (2) That in the case before the court there is a cross-libel, in regular form, in addition to the answer filed to the original libel, and that the libellant in the original libel appeared in the cross-suit and filed an answer.

Causes of the kind may be tried together or separately, as it is obvious that the pleadings in each are complete without any reference to

the other. Nothing is required on the part of the respondent in the original suit beyond his answer, unless he claims that his vessel was injured, and that the collision was occasioned wholly by the fault of the vessel of the original libellant. For all purposes of defense to the charges made by the libellant, his answer, if in due form, is sufficient; but if he intends to claim a decree for the damages suffered by his own vessel, then he should file a cross-libel. Damages for injuries to his own vessel cannot be decreed to him under an answer to the original libel, as the answer does not constitute a proper basis for such a decree in favor of the respondent. Consequently, whenever he desires to prefer such a claim, he should file an answer to the original libel, and institute a cross-action to recover the damage for the injuries sustained by his own vessel.

Controversies of the kind are usually tried together; and it appears that the two suits in this litigation were so tried in the district court, and that the district court came to the conclusion that the cross-suit was without merit, and dismissed the cross-libel; and, inasmuch as the libellant in that suit did not appeal from that decree, the suit is ended and determined. But the determination of that suit by such a decree did not determine the rights of the parties in the original suit; on the contrary, it left the issues in the latter suit just as they would have been had the cross-suit never been commenced.

Beyond doubt, the final decree dismissing the libel in the cross-suit determines that the libellant in that suit is not entitled to recover affirmative damages for any injuries suffered by his vessel in the collision, but it does not dispose of the issues of law or fact involved in the original suit. Instead of that, both parties in the cross-suit, if no appeal is taken from the decree in that suit, are remitted to the pleadings in the original suit; and it is undeniable that every issue in those pleadings is open to the parties, just the same as if no cross-libel had ever been filed.

Filed, as the cross-libel was, to enable the libellant in that suit to recover affirmative damages for the injuries received in the collision by his own vessel, which he could not recover under his answer in the original suit, the effect of the adverse decree, not appealed from, must be to preclude him from all such recovery in any subsequent judicial proceeding; but it was never heard that such a decree in a cross-libel impaired the right of the libellant, as the respondent in the original suit, to make good, if he can, every legal defense of law or fact set up and well pleaded in his answer to the original libel. Usually such suits are heard together, and are disposed of by one decree or by separate decrees entered at the same time; but a decision in the cross-suit adverse to the libellant, even if the decree is entered before the original suit is heard, will not impair the right of the respondent in the original suit to avail himself of every legal and just defense to the charge there made which is regularly set up in the answer, for the plain reason that the adverse decree in the cross-suit does not dispose of the answer in the original suit.

Such a decree, if not appealed from, is conclusive that the libellant in the cross-suit is not entitled to recover affirmative damages for any

injuries received by his own vessel; but it does not preclude him from showing in the original suit, if he can, that the collision was the result of inevitable accident, or that it was occasioned by the negligence of those in charge of the other vessel, or that it is a case of mutual fault, where the damages should be divided. *The Milan*, Lush., 398; *Williams & Br. Adm. Pr.*, 72, 254; *The Washington*, 5 Jur., 1067; *The Shannon*, 1 W. Rob., 463; *The Calypso*, Swab., 29; *The Navarro*, Olcott, 127; *Snow v. Carruth*, 1 Spr., 324; *Nichols v. Tremlett*, 1 Spr., 361; *The North American*, Lush., 79.

Whether the controversy pending is a suit in equity or in admiralty, a cross-bill or libel is a bill or libel brought by a defendant in the suit against the plaintiff in the same suit or against other defendants in the original suit or against both, touching the matters in question in the original bill or libel. It is brought in the admiralty to obtain full and complete relief to all parties as to the matters charged in the original libel; and in equity the cross-bill is sometimes used to obtain a discovery of facts.

New and distinct matters not included in the original bill or libel, should not be embraced in the cross-suit, as they cannot be properly examined in such a suit, for the reason that they constitute the proper subject-matter of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross-suit, and no others, as the cross suit is, in general, incidental to, and dependent upon, the original suit. *Ayres v. Carver*, 17 How., 595 [58 U. S., XV., 180]; *Field v. Schieffelin*, 7 Johns. Ch., 252; *Shields v. Barrow*, 17 How., 145 [58 U. S., XV., 162].

Apply these rules to the case before the court, and it is clear that the whole merits of the controversy, under the pleadings in the original suit, is open to both parties, the same as if the cross-suit had never been commenced.

Coming to the merits, the facts may be succinctly stated as follows: that the steamer, having passengers on board and a small cargo of general merchandise, was passing up the river, on the American side of the channel, on a trip from Detroit to Port Huron; and that the propeller, laden with a cargo of grain and flour, was coming down the river on the Canada side, bound on a voyage from Chicago to Buffalo. All agreed that the night was somewhat dark, and that there was considerable fog, which sometimes lifted for a brief period, so that the banks of the river, one or both, could be seen, and then would settle down so that neither could be seen by those on board either vessel. Sufficient appears to show that the steamer was well manned and equipped; that she showed the proper signal-lights; and that she had competent lookouts properly stationed on the vessel, and that they were faithful and vigilant in the performance of their duty.

Nothing need be remarked respecting her trip up the river until she reached Marine City, where it appears she stopped fifteen or twenty minutes. When she started from there, it was the intention of her master to touch at Ricard's Dock; and, with that view, those who had charge of her navigation when she left the wharf at that landing laid her course due north for

that place; and the evidence is full to the point that she pursued that course close to the American side of the channel until within a short distance—less than a quarter of a mile—of Richard's Dock, when, it being suggested that the vessel touched bottom, she ported her helm, and was put upon a course of north by east, which still kept her close to the channel-bank on the American side of the river; and it appears that she kept that course until the two vessels were so near together that a collision was inevitable.

Throughout the whole period, from the time she left the landing at Marine City, both before and after it was suggested that she touched bottom, the evidence is entirely satisfactory that she was proceeding slowly under check, constantly blowing two blasts of her whistle, once in two or three minutes, to signify that her course was on the American side of the channel. Proof equally satisfactory is also exhibited in the record showing that the blasts of her whistle were answered several times by two blasts of the whistle from the descending propeller, to signify that she was coming down the river on the Canada side of the channel.

Much discussion took place at the bar as to the place of the collision, it being insisted by the libellant that it was on the American side of the channel, and by the respondent that it was on the Canada side; but the evidence is so persuasive and convincing that the theory of the of the libelants in that regard is correct, that it would seem to be a work of supererogation to reproduce it. Nor is it necessary, in any point of view, as a full analysis of all the testimony on both sides is given by the district judge in his opinion published in the record.

Before adverting to the circumstances attending the collision, it becomes necessary to recur to the evidence, showing what were the antecedent acts of the propeller. Many of the facts, also, in respect to the propeller, are either conceded or so fully proved as to render much discussion unnecessary. She was a large vessel, with a full cargo, and was coming down the river at full speed; and it is not doubted that she kept pretty close to the Canada side of the channel until she got down opposite Bowen's Dock, when it is clear from the evidence that she ported her helm, intending to cross to the other side of the river, and to touch at Marine City, where her master resided. Just after she ported her helm, under the order of the mate, the master came on deck; and the evidence is convincing that neither the master nor the mate knew where the propeller was, and yet she was kept on her course under a port helm, without any diminution of her speed, until it was too late to adopt any effectual precaution to prevent a collision.

Enough appears to show, beyond all doubt, that the master intended to leave the Canada side of the river, and to stop at Marine City; and it may be that the helm of the propeller was put to port much earlier than was necessary for that purpose, or that the propeller was more distant from the Canada shore when the helm of the propeller was put to port than those in charge of her deck supposed. Suppose that was so: still it affords no defense for the propeller, as the evidence is decisive that neither the master nor the mate knew whether the propeller was in the center of the channel, or on

the American or Canada side of the channel. Instead of that, the mate testifies in the most positive manner that no one could see the shore on either side, and that neither the master nor anyone else could say whether a light which they saw was on one side or the other of the river.

Suffice it to say, the collision occurred; and the evidence shows, beyond all doubt, in the judgment of the court, that it occurred on the American side of the channel. Attempt is made to controvert that proposition, chiefly upon three grounds: (1) Because it appears that the propeller, when she answered the whistle of the steamer, was evidently on the Canada side of the river. (2) Because the propeller struck the steamer on her port bow. (3) Because the steamer sank on the Canada side of the channel of the river.

No doubt the propeller was on the Canada side of the channel until she ported her helm to pass over to the other side of the river preparatory to effect the intention of the master to touch at Marine City, where the master intended to stop. Equally satisfactory answer may be given to the other two objections taken to the theory of the libelants.

Persuasive proof having been introduced that the steamer was on the American side, it must be that the propeller crossed over to the American side before the steamer came up and, being somewhat nearer to the American shore than the steamer, struck her as she came up half a point on her port bow; and the master of the steamer testifies that he immediately found that the steamer was in danger of sinking, and consequently put his helm hard to port, and headed the steamer towards the opposite shore, and that she stranded on the Canada channel-bank.

Beyond question, the effect of the blow when the collision occurred was to turn the stem of the steamer from the American shore out into the stream. Besides, it also appears that the stem of the steamer was so damaged by the collision that the vessel would not obey her helm against the current; which of itself, it may be, rendered it necessary for the master to change the course of the steamer. That he did so is fully proved; and there is nothing in the record to show that a skillful mariner would have adopted any other course.

Examined in the light of these suggestions, it is clear, in the judgment of the court, that the collision occurred on the American side of the channel, and that the propeller was wholly in fault for the disaster. Both courts below concurred in that view; and *this court finds no error in the record and directs that the decree of the Circuit Court be affirmed.*

Cited—7 Sawy., 489.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA, *Ply. in Err.*,

ROSSELL M. RICHARDSON, JOHN LYNCH AND PELEG BARKER, FRANCIS SMITH, Admr. and Trustees of the Estate of DANIEL J. KNIGHT, Deceased, AND TRUEWORTHY BROWN.

(See S. C., 1 Otto, 454-474.)

The testimony bearing upon the matter of a license was objected to as incompetent by defendants, but the same was admitted subject to exception.

The court held that plaintiffs had given evidence for the jury which would authorize them to find a license to maintain the said buildings and occupy the defendants' land, to which no exception was taken.

The plaintiffs' claim to recover under the provisions of the General Statutes of Vermont, ch. 28, secs. 78, 79, which are as follows:

"Sec. 78. When an injury is done to a building or other property by fire communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury."

"Sec. 79. Any railroad corporation shall have an insurable interest in such property as is mentioned in the preceding section, along its route, and may procure insurance thereon in its own name and behalf."

The plaintiffs' testimony tended to show that the fire originated from one of two locomotive-engines belonging to the defendant, the first hauling a passenger train westerly, passing the plaintiffs' mill, about half past one in the afternoon; and the other, hauling a freight train easterly, passing the mill about four o'clock in the same afternoon. Said mill and other property were situated in the Town of Brunswick, Essex Co., Vt., about five miles westerly of North Stratford station, on the Connecticut River in New Hampshire, and about twelve miles easterly from Island Pond Station in Vt.

The fire was first discovered one half to three fourths of an hour after the last mentioned train went by the mill, burning in or on the westerly end of defendants' railroad bridge, which was a covered bridge 110 feet long. Plaintiffs' witnesses testified in substance that a strong wind was blowing at the time, which carried the fire through the bridge with great rapidity, consuming it entirely, and setting plaintiffs' saw-mill

on fire, the northwesterly corner of which was located within twelve or fifteen feet of the southeasterly corner of said bridge, and about the same distance from the main track of defendants' railroad; that it was a very dry time, and by reason of the wind blowing the fire through and from the bridge it caught in and upon the saw-mill and consumed it, and was blown and carried from thence to the other buildings and property sued for, consuming the same also.

Plaintiffs also claim to recover the value of a large quantity of manufactured lumber, consisting of headings and boards piled upon and near the defendant's roadway, which was burned. The headings were piled in the lumber shed and on the adjoining platform, awaiting transportation. The boards were stuck up in plaintiffs' mill-yard to dry, for the purpose of being manufactured into headings, and extended back from defendant's roadway at the lumber sheds in a southerly direction. Defendant objected to the admission of the testimony bearing upon this point; but the court overruled the objection, and exception was taken.

When the plaintiffs rested their case, defendant moved that a verdict be rendered in its favor for the following reasons:

1. Because the damages claimed are too remote.

2. Because a large part of the property sued for was wrongfully on the defendant's railroad, and not within the statutes of Vermont referred to; but the court denied the motion and the defendant excepted.

The defendant's evidence tended to show that this fire was not communicated by either of the engines complained of, but, on the contrary, that the plaintiffs for a long time had maintained a constant fire at the end of their tramway about 168 feet down stream on the same bank of the river, from where the westerly end of the railroad bridge rested, for the purpose of burning the edgings, stickings, slabs and other, waste material from the saw-mill, and that the fire which consumed its bridge and the plaintiffs' property ran along the bank of the river, or was borne by the wind to the westerly end of

(Field v. N. Y. C. R. R. Co., 82 N. Y., 346); or that defendant's engines at other times, before and after the burning, threw out large coals and set other fires. Bedell v. L. I. R. R. Co., 44 N. Y., 367; S. C., 4 Am. Rep., 688; Crist v. Erie R. R. Co., 1 Sup. Ct., T. & C., 436; S. C., 58 N. Y., 628; Hurd v. Barton, 25 N. Y., 544; Westfall v. Erie R. R. Co., 5 Hun, 76; Lee v. North. C. R. R. Co., 8 N. Y. Week. Dig., 111; Home Ins. Co. v. E. R. R. Co., 11 Hun, 184. Such evidence has been held sufficient to carry the case to the jury and to sustain a verdict for plaintiff.

The burden of proof of the company's negligence is on the plaintiff. Jeffries v. Phila., W. & B. R. R. Co., 3 Houst., 447; I. & C. R. R. Co. v. Paramore, 51 Ind., 143; Ruffner v. Cinc., H. & D. R. R. Co., 34 Ohio St., 96; Gandy v. Chic. & N. W. R. R. Co., 30 Iowa, 430; S. C., 6 Am. Rep., 682; see, also, the cases cited under the last paragraph.

The following circumstances have been held admissible to prove negligence: dropping coals upon the track of defendant, which set fire to a tie and from which the fire spread by means of some accumulated weeds, etc., to plaintiff's land (Weed v. Rome, W. & O. R. R. Co., 49 N. Y., 420; S. C., 10 Am. Rep., 389; Pa. R. R. Co. v. Hope, 80 Pa. St., 373; S. C., 21 Am. Rep., 100); the presence of dry grass and other inflammable material upon the way of a railroad, suffered to remain there without cause, is a fact from which negligence may be found (Kellogg v. Chic. & N. W. R. R. Co., 26 Wis., 223; S. C., 7 Am. Rep., 69; Bass v. B. & Q. R. R. Co., 28 Ill., 9; Ill. C. R. R. Co. v. Mills, 43 Ill., 407; Flynn v. S. C. & S. J.

R. R. Co., 40 Cal., 14; S. C., 6 Am. Rep., 595; Salmon v. D., L. & W. R. R. Co., 9 Vroom, 5; S. C., 20 Am. Rep., 356); that prior and subsequent other fires were kindled by the same engine in the vicinity (Henry v. S. P. R. R. Co., 50 Cal., 176); that numerous fires had been set by sparks from the same engine (Phila. & R. R. R. Co. v. Schultz, 93 Pa. St., 341); that fires on the line of the road had originated from sparks from company's locomotives prior to the fire in question (Smith v. O., C. & N. R. R. Co., 10 R. I., 22); that the same engine, using similar fuel, had emitted burning sparks which had fallen at as great a distance as the building destroyed (Bloss v. Boston & W. R. R. Co., 6 Allen, 87); that within a week before the fire in question, defendant's engines, in passing, scattered large sparks capable of setting fires, and that many fires from such sparks had been put out within that time (Annapolis & E. R. R. Co. v. Gantt, 89 Md., 115); that the emitting of coals and sparks in unusual quantities was frequent and permitted to be done by a number of engines (Pa. R. R. Co. v. Stranahan, 79 Pa. St., 465); that engines running over the division where the property destroyed was situated, at or about the time of the fire, habitually scattered fire from ash-pans and smoke stacks (Clevelands v. G. T. Ry. Co., 42 Vt., 449); that, a few weeks after the fire complained of, another fire was caused by sparks from defendant's engines by coals dropped from such engine. Longabaugh v. Va., C. & T. R. R. Co., 9 Nev., 271.

the bridge, where it was first discovered as aforesaid.

It having appeared that the defendant, before and at the time of this fire, had employed one Turcot to watch the bridge on account of the danger of its being burned, and plaintiffs having claimed on trial that the defendant had not used all due caution and diligence, and had not employed all suitable expedients to prevent the fire, by reason, among other things, of said Turcot, as plaintiffs contended, not watching the bridge more closely just before the fire, defendant offered to show that it was not the usual practice among railroads in that section of the country to employ a man to watch bridges like the one destroyed, but on plaintiffs' objection, the court excluded this testimony, to which the defendant excepted.

After the defendant had rested its case, the plaintiffs, in their closing testimony, were allowed to prove, subject to defendant's exception, that, at various times during the same summer before this fire took place, some of defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which plaintiffs claim communicated the fire in question, were among the number, and without showing that said locomotives were similar in their make, state of repair or management, to those which were claimed to have set the fire complained of.

Defendant's counsel requested the court to charge, that:

1. If the jury find that the erection of plaintiffs' buildings or the storing of plaintiffs' lumber so near the defendant's railroad track, as the testimony shows, was an imprudent or careless act, and that such a location of this property in any degree contributed to the loss which ensued; then plaintiffs cannot recover, even though the fire was communicated by defendant's locomotive.

2. That, at all events, under the circumstances disclosed in this cause, it was incumbent upon plaintiffs to use due caution and diligence, and to employ suitable expedients to prevent the communication of fire.

3. That the statute upon which the action is predicated does not apply to property located within the limits of the railroad, nor to personal property temporarily on hand.

The judge refused to charge the jury according to the first and third requests, but charged according to the second, with the qualification that there was no evidence in the case to which it had any application, to all which the defendant excepted.

Defendant also renewed its motion that a verdict be ordered in its favor for the reasons above set forth, which was again denied by the court, and defendant excepted.

The court also charged the jury that the burden of proof was upon the plaintiffs, in the first instance to show that the fire in question was communicated from some of the defendant's locomotive-engines to the bridge; that if the jury were satisfied of that act by a fair balance of evidence, then plaintiffs were entitled to recover, unless the defendant had established by a fair balance of evidence, that it had used all due caution and diligence, and had employed all suitable expedients to prevent the fire; that the burden of proof was on the defendant, as See 1 Otto.

to the latter branch of the case, to which exception was taken.

The jury returned a general verdict for the plaintiffs.

Messrs. George N. Dale, Geo. A. Bingham, E. J. Phelps and Ossian Ray, for plaintiffs in error:

I. The receipt for one dollar, to pay land rent for the year ending October 31, 1870, dated Oct. 27, 1870, given in evidence by defendants in error, subject to exception, was incompetent:

1. Because it was given nearly four months after the fire.

2. The dollar was paid merely to show a surrender on the part of the defendant in error of any right they had gained by adverse possession.

3. Presumably, the engineer had no authority to lease any part of the Company's railway, or to license anybody to occupy it.

II. The court erred in excluding the testimony offered by the plaintiff in error, to show that it was not the usual practice among railroads in that section of the country to employ a man to watch bridges like the one destroyed.

The evidence rejected certainly tended to show that the employment of Turcot to watch the bridge was an act of extraordinary and unusual care and diligence, and that whatever Turcot omitted to do at the time complained of, was merely a neglect to exercise extraordinary care; not an omission or want of ordinary care and prudence.

III. There was error in admitting the testimony introduced by the defendants in error, that some of the Company's locomotives scattered fire at various times during the same summer before the fire, when passing the saw-mill, without showing that either of the two which the defendants in error claimed to have communicated the fire in question, was among the number; and also without showing that either was similar in construction, state of repair or management, to those which scattered fire as aforesaid.

1. In order to have rendered the testimony admissible, it should have been confined to the same engines, operated in the same manner and in the same state of repair, or to other engines proved to have been of the same construction, used in the same manner and in the same state of repair.

Boyes v. R. R. Co., 42 N. H., 97; *Phelps v. Conant*, 80 Vt., 277; *Malton v. Nesbit*, 1 Car. & P., 70; *Hubbard v. R. R. Co.*, 89 Me., 506; *Standish v. Washburn*, 31 Pick., 287; *Collins v. Dorchester*, 6 Cush., 396; *Robinson v. R. R. Co.*, 7 Gray, 92; *Jordan v. Osgood*, 109 Mass., 457.

The effect of such evidence before the jury could not be otherwise than highly prejudicial to the plaintiff in error.

Sheldon v. R. R. Co., 29 Barb., 226; *Smith v. R. R. Co.*, 37 Mo., 287; *R. R. Co. v. Doak*, 52 Pa., 879.

The court gave to this testimony the full force and effect of evidence in chief, while, as a rule, in the few jurisdictions where such proof has been admitted at all, it has been received only as rebutting evidence.

Cleveland v. G. T. R. Co., 42 Vt., 449; *Ross v. R. R. Co.*, 6 Allen, 87.

IV. The motion of the plaintiff in error, that a verdict be ordered in its favor, because a

large part of the property sued for was wrongfully on its railway, ought to have been granted.

1. Railways are public corporations, charged with the performance of certain public duties and obligations. Such corporations have no power to part with their franchises, or any portion thereof, by license, lease, mortgage or other conveyance, without the consent of the Legislature; nor can they part with or abandon the control or occupancy of their roadway, in the manner and to the extent claimed here by the defendants in error, without such consent.

Any license of the Corporation for or acquiescence in such a permanent user within its chartered limits, ought to be held void, because contrary to sound public policy.

Such an intruder should be treated as a wrongdoer or trespasser, at least until his occupancy has ripened into a prescriptive right.

See, remarks of Pierpont, *Ch. J.*, in *R. R. Co. v. Potter*, 42 Vt., 285; *Jackson v. R. R. Co.*, 25 Vt., 150-159; *Hurd v. R. R. Co.*, 25 Vt., 116; *Richards v. R. R. Co.*, 44 N. H., 127; *Bemis v. C. & P. R. R. Co.*, 42 Vt., 375; *R. R. Co. v. Anderson*, 20 Mich., 244.

Another reason why a verdict should have been ordered in our favor is, that the Statute of Vermont, upon which the defendants in error claimed and were allowed to recover, has no application to property injured or destroyed within the limits of the roadway, even if it is rightfully there.

Bailey v. White, 41 N. H., 337; *Peaslee v. Gee*, 19 N. H., 273; *Metallic Co. v. R. R. Co.*, 109 Mass., 277; *Gorris v. Scott*, L. R. 9 Exch., 125; *Atkinson v. Water-Works Co.*, L. R. 6 Exch., 404; *Hall v. Brown*, 54 N. H., 495; *Barron v. Eldridge*, 100 Mass., 455; see cases everywhere.

A verdict should have been ordered for the plaintiff in error, because the damages claimed are too remote.

The testimony of the defendants in error tended to show that only two locomotives passed the saw-mill that afternoon before the fire; that the first one passed about one o'clock and thirty minutes; the other about four o'clock; that the fire was discovered half or three fourths of an hour later, burning at the westerly end of the railway bridge; that a strong wind was then blowing, which carried the fire through the bridge with great rapidity, consuming it entirely; and by reason of the wind blowing the fire from the bridge, it caught in and upon the saw-mill, located within twelve or fifteen feet of the bridge, and consumed that also; that the fire was blown and carried from the saw-mill to the other buildings and the property sued for, and they, too, were consumed.

See, *Op. of Hunt, J.*, in *Ryan v. R. R. Co.*, 35 N. Y., 210; *R. R. Co. v. Kerr*, 62 Pa., 353, is another well-considered authority. *Hooksett v. R. R. Co.*, 38 N. H., 242; *Harrison v. Berkeley*, 1 Strob. (S. C.), 548; *Morrison v. Davis*, 20 Pa., 171; *Ins. Co. v. Tweed*, 7 Wall., 44 (74 U. S., XIX., 65); *Pars. Cont.*, 198.

Whether the damages claimed were too remote, or otherwise, was at least a question for the jury.

Holden v. R. R. Co., 30 Vt., 297; *Sexton v. Bacon*, 31 Vt., 540; *R. R. Co. v. Pindar*, 58 Ill., 447; *Fent v. R. R. Co.*, 59 Ill., 851; *Fairbanks*

v. Kerr, 70 Pa., 86; *Kellogg v. R. R. Co.*, reported in Whart. Neg., sec. 154.

The evidence tended to show contributory negligence on the part of the defendants in error. They had encroached largely upon the Company's land, by erecting several wooden buildings close to the track. It was a very dry time. Knowing that the Corporation was obliged to run several locomotives daily, by their mill, the defendants in error had piled upon and near the roadway a large quantity of headings, boards and other dry and combustible material, which extended all along the platform between the mill and shed, and back into the mill-yard.

The question, whether there has been contributory negligence in a given case or not, is almost always a matter of fact to be settled by the jury, upon an intelligent consideration of all the circumstances.

Kelsey v. Glover, 15 Vt., 708; *Allen v. Hancock*, 16 Vt., 230; *Cassedy v. Stockbridge*, 21 Vt., 391; *Robinson v. Cone*, 22 Vt., 213; *Sessions v. Newport*, 23 Vt., 9; *Barber v. Essex*, 27 Vt., 63; *Briggs v. Taylor*, 28 Vt., 183; *Swift v. Newbury*, 36 Vt., 855; *Hill v. New Haven*, 37 Vt., 501; *Vinton v. Schwab*, 32 Vt., 612; *Folsom v. Underhill*, 36 Vt., 580; *Hodge v. Bennington*, 43 Vt., 450; *Willard v. Pinard*, 44 Vt., 34; *McCully v. Clarke*, 40 Pa., 389; *Hackford v. R. R. Co.*, 53 N. Y., 654; *Gonzales v. R. R. Co.*, 38 N. Y., 440; *Munger v. R. R. Co.*, 4 N. Y., 849; *R. R. Co. v. Van Steinburg*, 17 Mich., 99; *R. R. Co. v. Mills*, 42 Ill., 407; *R. R. Co. v. Frazer*, 47 Ill., 505; *R. R. Co. v. Shanefelt*, 47 Ill., 497; *R. R. Co. v. Terry*, 8 Ohio St., 570; *Webb v. R. R. Co.*, 57 Me., 117; *Bigelow*, Cas. Torts, 589, 596; Whart. Neg., ch. XI., secs. 420-427; *Page v. Parker*, 43 N. H., 363.

• There are several recent and well considered authorities, in actions against railway companies, where it has been decided that the plaintiff must affirmatively show that he was guilty of no negligence. These rest on the ground that the cars and engines of the road must run upon a fixed and permanent track, which cannot be deviated from; and because of the dangerous and uncontrollable power by which they are operated, holding that one who has placed himself or his property within their power and influence, might properly be called upon to explain by his evidence how he came there, before receiving damages for the injury.

Hill v. New Haven, 37 Vt., 501; *Gahagan v. R. R. Co.*, 1 Allen, 187; *Telfer v. R. R. Co.*, 80 N. J., 188.

Messrs. Halbert E. Paine and Henry Haywood, for defendants in error:

The court did not err in denying the defendant's motion for a verdict on the grounds:

1. That the alleged damages were too remote
2. That a large part of the property sued for was wrongfully on the defendant's railroad lands, and not within the statutes of Vermont referred to.

1. The damages were not too remote.

The opinion of the court in *Ryan v. R. R. Co.*, 35 N. Y., 210, presents an able argument in favor of the plaintiffs in error on this point. See, also, *Penn. R. R. Co. v. Kerr*, 62 Pa., 353.

And these two cases appear to be the only authorities in support of the doctrine.

Ins. Co. v. Tweed, 7 Wall., 44 (74 U. S., XIX.,

65); *Scott v. Shepherd*, 2 W. Bl., 892; *Webb v. R. R. Co.*, 49 N. Y., 420; *Montoya v. Lond. Assur. Co.*, 6 Exch., 451; *Piggot v. R. R. Co.*, 54 Eng. C. L., 229; *Smith v. R. R. Co.*, L. R., 5 C. P., 98; *Fant v. R. R. Co.*, 4 Chic. Leg. News, 326; 1 Redf. Cas., 2d ed., 350; *R. R. Co. v. Stanford*, 12 Kan., 354; *Kellogg v. R. R. Co.*, 26 Wis., 223; *Perley v. R. R. Co.*, 98 Mass., 414; *Ingersoll v. R. R. Co.*, 8 Allen, 438; *Hooksett v. R. R. Co.*, 38 N. H., 242; *Cleveland v. R. R. Co.*, 42 Vt., 449.

It is respectfully submitted to the court, that the two cases cited from 35 N. Y. and 62 Pa. stand opposed to all the other authorities bearing upon the question. The doctrine of those two cases is, that the Railway Company will not be liable to the owner of the building destroyed, unless the sparks or cinders are thrown from the engine directly upon the building. The doctrine of all the other cases is, that it is not essential to a recovery that the fire from the locomotive should have actually fallen upon the building destroyed; that if the loss were to have been expected as a natural consequence of the negligent act of the Railway Company, the liability might exist, whether the fire first fell upon the building destroyed, or upon some intervening object. In principle, it can evidently make no difference whether that intervening object is another building or a bridge, a fence, a cross-tie, a hedge or anything else of a combustible nature.

After the defendant had rested its case, the plaintiffs, in their closing testimony, were allowed to prove, subject to the defendant's exception, that at various times during the same summer, before this fire took place, some of the defendant's locomotives scattered fire when passing the mill and bridge, without showing that either of those which the plaintiffs allege to have communicated the fire in question were among the number, and without showing that said locomotives were similar in their construction, state of repair, or management, to those which were claimed to have caused the fire complained of.

This evidence was admissible. *Clayes v. Ferris*, 10 Vt., 112.

There being a unity of management in railway companies, evidence that some of the engines of a company are permitted to scatter fire, impeaches that management, and raises a probability, more or less strong, as to the cause of a particular loss.

Piggot v. R. R. Co., 54 Eng. Com. Law, 229; *Sheldon v. R. R. Co.*, 14 N. Y., 218; *Field v. R. R. Co.*, 32 N. Y., 339; *Webb v. R. R. Co.*, 49 N. Y., 420; *Cleveland v. R. R. Co.*, 42 Vt., 449; *Burke v. R. R. Co.*, 7 Heisk., 456; *Garrett v. R. R. Co.*, 36 Ia., 122; *Gandy v. R. R. Co.*, 30 Ia., 420; *Fitch v. R. R. Co.*, 45 Mo., 322; *R. R. Co. v. McClelland*, 42 Ill., 356; *Smith v. R. R. Co.*, 10 R. I., 22; *Longabaugh v. R. R. Co.*, 9 Nev., 271.

The court properly refused to charge the jury, that if they found that the erection of the plaintiffs' buildings, or the sawing of their timber so near to the defendant's railroad track was an imprudent or careless act, and that such a location of this property in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendant's locomotives.

See 1 Otto.

When a person, in the lawful use of his own property, places it in a situation of hazard and exposure near the line of a railway, he does not thereby lose his remedy for injuries occasioned by the negligent acts of the railway company.

Cook v. Champlain Trans. Co., 1 Den., 91; *Fero v. R. R. Co.*, 22 N. Y., 215.

The rule releasing the defendant from liability on account of contributory negligence of the plaintiffs, is limited to cases where the negligent act or omission of the plaintiffs is the proximate cause of the loss.

Flynn v. R. R. Co., 40 Cal., 18, and cases cited; *Lowell v. R. R. Co.*, 28 Pick., 31; *Littleton v. Richardson*, 32 N. H., 59; *Norris v. Litchfield*, 35 N. H., 271; *Ingersoll v. R. R. Co.*, 8 Allen, 438; *Davies v. Mann*, 10 M. & W., 545; *Richmond v. R. R. Co.*, 18 Cal., 357; *Kline v. R. R. Co.*, 37 Cal., 400; *Needham v. R. R. Co.*, 37 Cal., 409; *Wright v. Brown*, 4 Ind., 98; *Kerwhaker v. R. R. Co.*, 3 Ohio St., 172; *R. R. Co. v. Elliott*, 4 Ohio St., 474.

The plaintiffs' failure to take unusual care of the property destroyed is no defense to the action. *Shearm. Neg.*, 3d ed., pp. 85, 404, and cases cited; *Kellogg v. R. R. Co.*, 26 Wis., 223, and cases cited.

Mr. Justice Strong delivered the opinion of the court:

The plaintiffs below were permitted to adduce evidence that those of the injured buildings which were within the lines of the roadway had been erected within those lines by the license of the Company, for the convenience of delivering and receiving freight. The admission of this evidence is the subject of the first assignment of error; and in its support it has been argued that it was the duty of the Railroad Company to preserve its entire roadway for the use for which it was incorporated; that it had no authority to grant licenses to others to use any part thereof for the erection of buildings; and, therefore, that the license to the plaintiffs, if any was made, was void. Thus the basis of the objection to the evidence appears to be, that it was immaterial. We are, however, of opinion that it was properly admitted. If the buildings of the plaintiffs were rightfully where they were, if there was no trespass upon the roadway of the Company, it was clearly a pertinent fact to be shown; and while it must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway, and is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. It is not doubted that the defendant might have erected similar structures on the ground on which the plaintiffs' buildings were placed, if in its judgment the structures were convenient for the receipt and delivery of freight on its road. Such erections would not have been inconsistent with the purposes for which its charter was granted. And, if the Company might have put up the buildings, why might it not license others to do the same thing for the same object, namely: the increase of its facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain, so long as a free and safe passage is left

for the carriage of freight and passengers. There is, then, no well-founded objection to the admission of evidence of a license, or evidence that the plaintiffs' buildings were partly within the line of the roadway by the consent of the defendant. The objection to the mode of proof is equally unsustainable. There was quite enough without the receipt of Oct. 27, 1870, to justify a finding by the jury that the plaintiffs were not trespassers. But the receipt itself was competent evidence. It is true, it was given after the occurrence of the fire; but it was a mutual recognition by the Company and by one of the plaintiffs that the occupation of the roadway by the buildings had been, and that it was at the time of the fire, permissive, and not adverse. Taking the receipt, as the bill of exception shows, was the act of the defendant by its agent, the engineer who had charge of the road-bed. It was, therefore, an admission by the Company that there had been consent to the occupation.

The second assignment of error is, that the court excluded testimony offered by the defendant to show that the usual practice of railroad companies in that section of the country was not to employ a watchman for bridges like the one destroyed. It is impossible for us to see any reason why such evidence should have been admitted. The issue to be determined was, whether the defendant had been guilty of negligence; that is, whether it had failed to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise. Hence the standard by which their conduct was to be measured was not the conduct of other railroad companies in the vicinity; certainly not their usual conduct. Besides, the degree of care which the law requires in order to guard against injury to others varies greatly according to the circumstances of the case. When the fire occurred which caused the destruction of the plaintiffs' buildings, it was a very dry time, and there was a high wind. At such a time, greater vigilance was demanded than might ordinarily have been required. The usual practice of other companies in that section of the country sheds no light upon the duty of the defendant when running locomotives over long wooden bridges, in near proximity to frame buildings, when danger was more than commonly imminent.

The third assignment of error is, that the plaintiffs were allowed to prove, notwithstanding objection by the defendant, that, at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair or management, to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But, whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission as rebutting was within the discretion of the court below, and not reviewable here. The question, therefore, is, whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiffs' property, were

caused by any of the defendant's locomotives. The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the Railroad Company. *Piggot v. R. R. Co.*, 3 M., G. & S., 229; *Sheldon v. R. R. Co.*, 14 N. Y., 218; *Field v. R. R. Co.*, 32 N. Y., 339; *Webb v. R. R. Co.*, 49 N. Y., 420; *Cleveland v. R. R. Co.*, 42 Vt., 449; *R. R. Co. v. Williams*, 44 Ill., 176; *Smith v. R. R. Co.*, 10 R. I., 28; *Loughbaugh v. R. R. Co.*, 9 Nev., 271. There are, it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us, that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage. We cannot, therefore, sustain this assignment.

It is contended further on behalf of the defendant, that there was error in the court's refusal to direct a verdict in its favor because a large part of the property destroyed was wrongfully on its railway, and not within the purview of the Statute of Vermont, on which the plaintiffs relied. If, however, we are correct in what we have heretofore said, it was not for the court to assume that any part of the property was on the roadway wrongfully, and to instruct the jury on that assumption; and, even if it had been wrongfully there, the fact would not justify its destruction by any willful or negligent conduct of the defendant. In *Bemis v. R. R. Co.*, 42 Vt., 380, it was said that a railroad company in the discharge of its duties, and in the exercise of its right to protect its property from injury to which it is exposed by the unlawful act or neglect of another, is bound to use ordinary care to avoid injury even to a trespasser. If this be the correct rule, and it cannot be doubted, how could the circuit court have charged as a conclusion of law that the plaintiffs could not recover because their property was wrongfully within the lines of the defendant's roadway?

Again; the court was asked to direct a verdict for the defendant, for the alleged reason that the damages were too remote. The bill of exceptions shows that the fire originated in the bridge of the defendant, and spread thence to the mill and other property of the plaintiffs; and we are referred to the rulings in *Hyatt v. R. R. Co.*, 35 N. Y., 210, and *R. R. Co. v. Kerr*, 62 Pa. St., 353, as showing that, in such a case, negligently setting the bridge on fire is not to be considered the proximate cause. We do not, however, deem it necessary to inquire whether the doctrine asserted in those cases is correct. It is in conflict with that laid down in many other decisions; indeed, in conflict, we think, with the large majority of decisions made by the American courts in similar cases. But we

think the Statute of Vermont has a direct bearing upon the defendant's liability. That Statute, ch. 28 of the General Statutes, secs. 78 and 79, is as follows:

Sec. 78. "When an injury is done to a building or other property by fires, communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence and employed suitable expedients to prevent such injury."

Sec. 79. "Any railroad corporation shall have an insurable interest in such property as is mentioned in the preceding section, along its route, and may procure insurance in its own name and behalf."

That the statute contemplates such buildings and property as were destroyed in this instance, we cannot doubt. The buildings were along the route of the railroad; though some of them were, in whole or in part, within the lines of the roadway. It is obvious to us that the phrase "along its route" means in proximity to the rails upon which the locomotive-engines run. That the 79th section gave an insurable interest in the property, for the destruction of which the Corporation was made liable, does not necessarily show that the only property intended was such as was outside the lines of the roadway. That, indeed, was comprehended; but property lawfully within the lines, which the Company did not own, equally needed protection. The statute was designed to be a remedial one, and it is to be liberally construed. In Massachusetts, there is a statute almost identical with that of Vermont; and under it the Supreme Judicial Court of that State held, in *Ingersoll v. R. R. Co.*, and *Quigley v. R. R. Co.*, 8 Allen, 438, that the company was liable to both the plaintiffs, though the fire communicated directly from the locomotive to Ingersoll's barn, and spread through an intervening shed, which stood partly upon the railroad location, to the barn of Quigley. The court said: "There is nothing in the statement to show that any fault of the plaintiff contributed to the loss, if the buildings were lawfully placed where they stood. The fact that a building stands near a railroad, or wholly or partly on it, if placed there with the consent of the company, does not diminish their responsibility in case it is injured by fire communicated by their locomotives. The Legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." These cases are directly in point as to the reach of the statute. They show that it embraces buildings on the line of the roadway, and buildings injured by fire spreading from other buildings to which fire was first communicated from a locomotive. To the same effect is *Hart v. R. R. Co.*, 18 Met., 99. And, if it be conceded that the statute is applicable only to injuries of buildings and other property which the Railroad Company may insure, we do not perceive why it may not obtain insurance of buildings and property on its location with its consent. But, if the statute is applicable to the case, it is plain that the circuit court could not direct a verdict for the defendant for the reason that the damages were too remote.

See 1 Otto.

Exception was taken at the trial to the refusal of the court to affirm the defendant's points; the first of which was, that "If the jury should find that the erection of the plaintiffs' buildings, or the storing of their lumber so near the defendant's railroad track, as the evidence showed, was an imprudent or careless act, and that such a location in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendant's locomotive." We think the court correctly refused to affirm this proposition. The fact that the destroyed property was located near the line of the railroad did not deprive the owners of the protection of the statute, certainly, if it was placed where it was under a license from the defendant. Such a location, if there was a license, was a lawful use of its property by the plaintiffs; and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant. *Cook v. Transp. Co.*, 1 Den., 91; *Fero v. R. R. Co.*, 22 N. Y., 15. Besides, it was not for the court to affirm that even an imprudent location of the plaintiffs' buildings and property was a proximate cause of the loss.

The second request for instruction was, "That at all events, under the circumstances disclosed in the case, it was incumbent upon the plaintiffs to use due caution and diligence, and to employ suitable expedients to prevent the communication of fire." The request was broad; but the court gave the instruction asked, adding only that there was no evidence in the case to which it had any application; and we have been unable to find any in the record. A question is not to be submitted to a jury without evidence.

The third prayer for instruction was based on the assertion, that "The statute upon which the action was predicated does not apply to property located within the limits of the railroad, nor to personal property temporarily on hand." This view of the statute, as we have already remarked, is not, in our judgment, correct as a general proposition, and certainly not in its application to a case where property is placed within the lines of a railway, by the consent of a railway company, for the convenience in part of its traffic.

It remains only to add, that we see no just ground of complaint of the affirmative instruction given to the jury. It was in accordance with the rule prescribed by the statute; and there seems to have been no controversy in the circuit court respecting the question, whether, if the fire was communicated to the bridge by a locomotive, it caused the injury to the plaintiffs.

The judgment is, therefore, affirmed.

Cited—80 N. J. L., 307.

SARAH E. LLOYD ET AL., *Appts.*,
v.
MONTROVILLE C. FULTON, as Trustee
for VIRGINIA F. FULTON.

(See S. C., 1 Otto, 479-487.)

Verbal promise to make settlement on wife—prior indebtedness, when evidence of fraud—marriage settlement, when upheld.

1. In a State where the English Statute of Frauds, touching promises made in consideration of marriage is in force, a verbal promise of the husband to settle property on his wife, made before the marriage, is void, and such promise made after the marriage was without consideration and, therefore, of no validity.

2. In a voluntary settlement upon the grantor's wife, prior indebtedness is only presumptive, and not conclusive proof of fraud, and this presumption may be explained and rebutted.

3. A marriage settlement upheld, when the debtor reserved property worth more than twice and a half the amount of his debts, and expected to pay all he owed, and continued to do so until he lost his means by the hazards of business; and the creditor rested supine for a long time.

[No. 108.]

Argued Jan. 4, 1875. Decided Jan. 17, 1876.

A PPEAL from the Circuit Court of the United States for the Northern District of Georgia.

This was a bill in equity, filed by the appellee, in the United States District Court for the Northern District of Georgia, Nov. 24, 1871, the district court then having circuit court powers, for the purpose of enjoining the plaintiffs in error from enforcing an execution, on a judgment against complainant, against certain property, on the ground that this property had been conveyed by complainant, in trust for his wife.

Pending this action, the Circuit Court for this district was created.

The facts are stated by the court.

Messrs. P. Phillips and B. H. Hill, for appellants:

The well recognized doctrine of this court, as stated in the American Leading Cases, commenting on the decision of *Sexton v. Wheaton*, 8 Wheat., 242, is, that the distinction established between previous and subsequent creditors is universally received; and while, as against the latter, a conveyance is not void unless actually fraudulent, it is admitted to be a general principle in the courts of this country, except New York, where fraud is always a question of fact, that as against creditors existing at the time of the conveyance, a voluntary conveyance is fraudulent in law, and void."

Admitting the question of fraudulent intent to be, under the decisions in Georgia, as it is in New York, a question of fact and not of law; still, as to a prior creditor, the deed is everywhere held to be *prima facie* fraudulent. *Howard v. Snelling*, 82 Ga., 196.

We maintain that all the circumstances in this case tend strongly to the conclusion that the intent was to delay and hinder the creditors.

Mr. John D. Pope for appellee:

The doctrine of Lord Hardwicke in *Townshend v. Windham*, 2 Ves., 10, and of Chancellor Kent, in *Reade v. Livingston*, 8 Johns. Ch., 481, to the effect that a voluntary conveyance founded on a meritorious consideration is *per se* void as against existing creditors, is not law, either in England or America. It has been denied in England in *Lush v. Wilkinson*, 5 Ves., 884, in *Townsend v. Westcott*, 2 Beav., 840; *Cudogan v. Kennett*, Cowp., 434; *Gale v. Williamson*, 8 M. & W., 410; *Shears v. Rogers*, 3 B. & Ad., 862; and *Freeman v. Pope*, L. R., 5 Ch. App., 588.

It has been denied in nearly every State of

the American Union, in cases too numerous to be cited.

Howe v. Ward, 4 Me., 195; *Seward v. Jackson*, 8 Cow., 423; *Babcock v. Eckler*, 24 N. Y., 623; *Moritz v. Hoffman*, 85 Ill., 553; *Gridley v. Watson*, 53 Ill., 198; *Lorow v. Wilmarth*, 9 Allen, 882; *Winchester v. Charter*, 12 Allen, 606; *Weed v. Davis*, 25 Ga., 684; *Miller v. Wilson*, 15 Ohio, 108; *Jones v. Young*, 1 Dev. & B., 852; *Arnett v. Wanett*, 6 Ired., 41; *Young v. White*, 25 Miss., 146; *Wilson v. Kohlheim*, 46 Miss., 846; *Taylor v. Eubanks*, 8 A. K. Marsh., 289; *Hamilton v. Greenwood*, 1 Bay (S. C.), 173; *Salmon v. Bennett*, 1 Conn., 525; *Lane v. Kingberry*, 11 Mo., 409; *Burkey v. Self*, 4 Sneed, 121; *Chambers v. Spencer*, 5 Watts, 404; *Posten v. Posten*, 4 Whart., 27; *Worthington v. Shipley*, 5 Gill., 449; *Dodd v. McGraw*, 3 Eng. (Ark.), 98; *Smith v. Yell*, 3 Eng. (Ark.), 470; *Outter v. Griswold*, Walk. Ch. (Mich.), 438; *Townsend v. Maynard*, 45 Pa., 198; *Hinde v. Longworth*, 11 Wheat., 212; *Sedgwick v. Place*, 12 Blatchf., 168; *Kehr v. Smith*, 20 Wall., 35 (87 U. S., XXII., 315).

And Chancellor Kent himself yields the doctrine in 2 Com., 572, marg. 442, 11th ed., n. a.

Fraud or no fraud, under Stat. 13 Eliz., ch. 5, is a question of fact. The indebtedness of the grantor at the time of making the deed is mere evidence which is to be weighed in connection with other evidence, and may be overcome by it.

Seward v. Jackson (supra); *Taylor v. Eubanks* (supra); *Weed v. Davis*, 25 Ga., 686; *Sedgwick v. Place*, 12 Blatchf., 168; *Langley v. Perry*, 3 Am. L. Times, Bankruptcy Rep., 84; *Townsend v. Maynard*, 45 Pa., 198; *Lane v. Kingberry*, 11 Mo., 409; *Howard v. Williams*, 1 Bailey (S. C.), 575; *Babcock v. Eckler*, 24 N. Y., 631; 1 Sm. L. Cas., 7th Am. ed., 41; *Hinde v. Longworth*, 11 Wheat., 213; *Adams, Eq.*, 147; 1 Story, Eq., sec. 865; *Winchester v. Charter*, 12 Allen, 606; *Page v. Kendrick*, 10 Mich., 300; *Jackson v. Dean*, 1 Doug. (Mich.), 519; *Smith v. Niel*, 1 Hawks, 341; *Howe v. Ward*, 4 Me., 208; *Moritz v. Hoffman*, 85 Ill., 555.

The true question under Stat. 13 Eliz., ch. 5, in the absence of actual fraudulent intent, is: was there sufficient property left after the settlement or conveyance, to pay all existing debts? See, above cases.

But, whether the foregoing propositions be true or not, the Code of Georgia, in which State the property conveyed is situate, settles the case in favor of complainants. Section 1954 of the Code in force Sep. 14, 1864.

Mr. Justice Swayne delivered the opinion of the court:

All the testimony in this case was taken by the appellee. He was complainant in the suit. Only two witnesses were examined—himself, and his brother-in-law, James S. Hamilton. There is no discrepancy in their statements. The facts lie within narrow limits.

Fulton, the appellee, married Virginia F. Hamilton, the daughter of Thomas N. Hamilton, in the year 1851. Her father was a man of very large fortune. Fulton received by her, before and after her father's death, more than \$100,000. He had himself, at the time of his marriage, substantially nothing. His father-in-law died intestate in 1859. Before and after his marriage, Fulton promised his father-in-law to

NOTE.—Settlements or conveyances for benefit of wife and child, when good or void as to creditors. See note to *Sexton v. Wheaton*, 19 U. S. (8 Wheat.), 229.

settle his wife's fortune upon her. After his father-in-law's death, he made the same promise to her brother, James S. Hamilton, who administered upon his father's estate. Nothing in fulfillment of these promises was done by Fulton until the 14th of September, 1864. On that day he executed to James S. Hamilton the deed made a part of the bill. It conveyed the premises in controversy in trust for the sole and separate use of the wife of the appellee and her children. The deed contained, among other things, a provision, that, if Hamilton should die, resign, or be removed from the trusteeship, she might appoint her husband, or any other fit person, as trustee in his place. On the same day Hamilton resigned, and Fulton was appointed. On the 16th of May, 1861, Fulton executed to James Lloyd two notes of \$5,000 each, one payable on the first of September following, the other on the first of September, 1862. There was due on these notes, at the date of the trust-deed, \$11,780. Fulton then owed to other persons not exceeding \$2,000. This was the extent of his indebtedness. The aggregate of his liabilities was less than \$14,000. He retained in his hands property worth \$36,000, besides non-enumerated articles worth \$20,000 in Confederate currency. The point of depreciation which that currency had then reached is not shown. The property reserved was of greater value than that conveyed. After the execution of the deed he was able to pay the notes. In 1862 he offered to pay them in Confederate currency, which was then but little depreciated. Payment in that medium was refused. His ability to pay continued until 1866. In that year he embarked in the enterprise of raising cotton in Arkansas. The result wrecked his fortune, and ruined him. He has since been unable to pay the notes. Suit was commenced against him upon the notes in February, 1868; and in May, 1871, judgment was recovered for \$10,000 with interest, amounting to \$6,447.81 and costs. Execution was issued and levied upon the trust property described in the bill. This suit was brought to enjoin the sale, and the circuit court decreed in favor of the complainant.

The provision of the English Statute of Frauds, touching promises made in consideration of marriage, is in force in Georgia.

The promise of Fulton to Thomas N. Hamilton before the marriage was, therefore, void. Browne, Stat. Frauds, 220, 514.

His promise after the marriage was without consideration and, therefore, of no validity. The same remark applies to the like promise to James S. Hamilton, the administrator.

The principle of the wife's equity has no application to this case. *Wickes v. Clarke*, 3 Edw. Ch., 63. The trust-deed was clearly a voluntary conveyance. Lloyd was a prior creditor.

Was the deed good against him?

This question is the core of the controversy between the parties.

Formerly, according to the rule of English jurisprudence, such deeds, as against such creditors, were void. *Townshend v. Windham*, 2 Ves., 10. The same principle was applied in such cases in this country. *Reade v. Livingston*, 3 Johns. Ch., 481. It has been overruled in the English courts. *Lush v. Wilkinson*, 5 Ves., 384; *Townsend v. Westcott*, 2 Beav., 345; *Gale v. Williamson*, 8 M. & W., 410; *Shears v.*

See 1 Otto

Rogers, 8 Barn. & Ad., 96; *Freeman v. Pope*, L. R., 5 Ch. App. Cas. Eq., 544, 545. It has been also overruled by this court: *Hinde v. Longworth*, 11 Wheat., 213; *Kehr v. Smith*, 20 Wall., 85 [87 U. S., XXII., 315], and in most of the States of our Union. The state adjudications to this effect are too numerous to be cited. We shall refer to a few of them. *Howe v. Ward*, 4 Me., 195; *Moritz v. Hoffman*, 35 Ill., 553; *Lerrow v. Wilmarth*, 9 Allen, 382; *Miller v. Wilson*, 15 Ohio, 108; *Young v. White*, 25 Miss., 146; *Taylor v. Eubanks*, 3 A. K. Marsh., 239; *Salmon v. Bennett*, 1 Conn., 525; *Worthington v. Shipley*, 5 Gill, 449; *Townsend v. Maynard*, 45 Pa., 199.

Such is also the law of the State whence this case came to this court. *Weed v. Davis*, 25 Ga., 686. It is a rule of property there; and this court is, therefore, bound to apply it, in the case in hand, as if we were sitting as a local court in that State. Jud. Act of 1789, sec. 34, 1 Stat. at L., 73; *Olcott v. Bynum*, 17 Wall., 44 [84 U. S., XXI., 570].

The rule as now established is, that prior indebtedness is only presumptive and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test.

Perhaps no more striking illustration can be found, of the application of this principle and of the opposition its establishment encountered, than is presented in the several cases of *Van Wyck v. Seward*. On the 6th of November, 1817, Seward assigned a judgment to Van Wyck, and gave him a guaranty that it was collectible. The judgment was a lien upon lands fairly to be presumed more than sufficient to satisfy it. On the 16th of April, 1818, Seward conveyed all his real estate, consisting of a farm of two hundred acres, to his son. The consideration of the deed was the payment of a specified sum to each of two daughters of the grantor, and an annuity for life of \$500 to the grantor himself, who was then aged and infirm. The lands, bound by the lien of the judgment, were sold under execution and bought in by Van Wyck for a nominal sum. He thereupon sued Seward upon his guaranty and recovered a judgment, which was docketed on the 18th of September, 1820.

Van Wyck thereupon sold under execution and bought in the farm which Seward had conveyed to his son, and brought an action of ejectment to recover possession. The jury found that there was no actual fraud. The Supreme Court nevertheless, upon the ground that the liability was prior to the deed, following the ruling of *Chancellor Kent* in *Reade v. Livingston*, gave judgment for the plaintiff's lessor. *Jackson v. Seward*, 5 Cow., 67. This judgment, upon grounds chiefly technical, was reversed by the Court of Errors of New York. *Seward v. Jackson*, 8 Cow., 428. Van Wyck thereupon filed a bill in equity to avoid the deed. *Chancellor Walworth* concurred with the jury in the prior case as to the absence of fraud and, upon that ground and the further ground of

the circumstances of the sale of the property covered by the lien of the judgment, dismissed the bill. *Van Wyck v. Seward*, 6 Paige, 63. The Court of Errors, upon appeal, affirmed this decree by a majority of one. The vote was fourteen to fifteen. *Van Wyck v. Seward*, 18 Wend., 375. So ended the litigation. Perhaps in no case was the subject more elaborately examined. This case was fatal to the old rule. We think the new one more consonant to right and justice and founded in the better reason.

In *Miller v. Wilson*, 15 Ohio, 108, the doctrine of this case was expressly affirmed by the Supreme Court of Ohio, though the result upon the facts was in favor of the creditors. The facts of the case in hand are more favorable for the support of the deed than those in *Van Wyck v. Seward*. Here the debtor reserved property worth more than twice and a half the amount of his debts. He expected and intended to pay all he owed. He continued able to do so until he lost his means by the hazards of business. The creditor rested supine for a long time. He did not take his judgment until more than eight years after the second note matured, and more than six years after the execution of the trust-deed. More than seven years had elapsed when the levy was made. The validity of the deed was then challenged for the first time. The creditor quietly looked on until after misfortune had deprived the debtor of the ample means of payment which he had reserved, and now seeks to wrest from the wife the small remnant of property which her husband acquired by means derived wholly from her estate, and which, in part fulfillment of his promise repeatedly made both before and after his marriage, he endeavored to secure to her and her children.

The evidence, as it stands in the record, satisfies us of the honesty of the transaction on his part. The non-payment and the inability to pay are the results, not of fraud, but of accident and misfortune. When Fulton executed the deed, he did what he then had the right to do, and was morally, though not legally, bound to do.

The proofs would not warrant us in holding that the settlement does not rest upon a basis of good faith, or that it is not free from the taint of any dishonest purpose.

The decree of the Circuit Court is affirmed.

Cited—101 U. S., 229; 18 Bk. Reg., 128; 2 Filipp., 194.

MAGDALENA A. ZELLER, Widow of F. C. ZELLER, Deceased; HENRIETTA ZELLER, Minor Heir, by her Tutrix, M. A. ZELLER; C. J. ZELLER, GEORGE ZELLER, LOUIS ZELLER AND MAGDALENA, Wife of P. BETZ, Heirs of F. C. ZELLER, Deceased, *Plffs. in Err.*,

v.

EDGAR A. SWITZER.

(See S. C., 1 Otto, 487, 488.)

Final judgment, what is.

When the state judgment is one of reversal only

NOTE.—What is "final decree" or judgment of state or other court from which appeal lies. See note to *Gibbons v. Ogden*, 19 U. S. (6 Wheat.), 448.

and the case is remanded for trial, the judgment is not final, and this court has no jurisdiction over it. [No. 611.]

Submitted Jan. 10, 1876. Decided Jan. 24, 1876.

IN ERROR to the Supreme Court of the State of Louisiana.

Motion to dismiss.

The case is stated by the court.

Mr. John A. Grow, for defendant in error.

Messrs. E. T. Merrick and G. W. Race, for plaintiffs in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This action was brought upon a bond given to release the steamboat Frolic from a provisional seizure. The defendants answered the petition November 25, 1870, setting up several defenses, and, December 5, 1870, filed a peremptory exception. The court below, upon hearing, sustained this exception and gave judgment in favor of the defendants. The defenses set up in the answer were not passed upon.

From this judgment an appeal was taken to the Supreme Court, where a judgment was entered as follows:

"On appeal from the Second Judicial Court, Parish of Jefferson, it is ordered and adjudged that the judgment of the lower court be set aside; that the exception be overruled; that the case be remanded to be proceeded with according to law; and that the appellee pay costs of appeal."

To reverse this judgment the present writ of error has been prosecuted, and a motion is now made to dismiss the writ because the judgment is not final.

We think this motion must be granted. The judgment is one of reversal only, and the case is remanded to be proceeded with according to law. The Supreme Court has decided that the defense set forth in the peremptory exception was not good; and that is all that court has decided. The case was, therefore, sent back for trial upon the defenses set up in the answer, or any other that might be properly presented. If the decision below upon the exception had been correct, such a trial would have been unnecessary. The Supreme Court having decided that it was not correct, the inferior court must now proceed further. This brings the case within our ruling at the present Term, in *Ex parte French* [*ante*, 249].

The writ is dismissed.

ROBERT B. BOLLING, *Plff. in Err.*,

v.

GUSTAVUS LERSNER,

(See S. C., 1 Otto, 594-596.)

Jurisdiction over state judgments.

To give this court jurisdiction over a state judgment, it must appear that a federal question was in fact decided, or that its decision was necessarily

NOTE.—Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn the question statute, treaty or Constitution of U. S. See note to *Matthews v. Zane*, 8 U. S. (4 Cranch), 282; note to *Martin v. Hunter*, 14 U. S. (1 Wheat.), 301; and note to *Williams v. Norris*, 25 U. S. (12 Wheat.), 117.

involved in the judgment. That a federal question was presented for decision, is not sufficient.

[No. 658.]

Submitted Jan. 10, 1876. Decided Jan. 24, 1876.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

The case is stated by the court.

Messrs. James V. Brooke and J. R. Tucker, for defendant in error.

Mr. Conway Robinson, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The Circuit Court of Fauquier County, Va., rendered a decree in this cause September 18, 1867. From this decree Lersner prayed an appeal to the District Court of Appeals, May 17, 1869. This was allowed by W. Willoughby, *Judge*. Upon this allowance the appeal was docketed in the appellate court, and the parties appeared without objection or protest, and were heard. Upon the hearing, the decree of the circuit court was reversed, and the cause remanded with instructions to proceed as directed. When the case came to the circuit court upon the mandate of the appellate court, Bolling appeared and objected to the entry of the decree which had been ordered, for the reason, among others, that Willoughby, the judge who allowed the appeal, had been appointed to his office by the commanding general exercising military authority in Virginia under the Reconstruction Acts of Congress, and that those Acts were unconstitutional and void. This objection was overruled, and a decree entered according to the mandate. From this decree Bolling took an appeal to the Supreme Court of Appeals, where the action of the circuit court was affirmed. To reverse this decree of affirmance the present writ of error has been prosecuted.

We cannot re-examine the judgment or decree of a state court simply because a federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered.

In this case, Bolling presented to the court for its determination the question of the constitutionality of the Reconstruction Acts. This was a federal question, but the record does not show that it was actually decided, or that its decision was necessary to the determination of the cause. While it, perhaps, sufficiently appears that the judge was appointed under the authority of the Acts in question, it also appears that he was acting in the discharge of the duties of his office, and that he had the reputation of being the officer he assumed to be. It also appears that, after the allowance of the appeal, the case was docketed in the appellate court; that Bolling appeared there; that he submitted himself to the jurisdiction of that court without objection, and presented his case for adjudication; that the case was heard and decided; and that the objection to the qualification of the judge who allowed the appeal was made for the first time in the circuit court, when the case came down with the mandate.

From this it is clear that the case might have been disposed of in the state court without deciding upon the constitutionality of the recon-

See 1 Otto.

struction Acts. Thus, if it was held that the objection to the authority of the judge came too late, or that the allowance of an appeal by a judge, *de facto*, was sufficient for all the purposes of jurisdiction in the appellate court, it would be quite unnecessary to determine whether the judge held his office by a valid appointment. We might, therefore, dismiss the case, because it does not appear from the record that the federal question was decided, or that its decision was necessary.

But, if we go further and look to the opinion of the court, which, in this case, has been certified here as part of the record, we find that the federal question was not decided. All the judges agreed that Willoughby was a judge *de facto*, and that his acts were valid in respect to the public and third parties, even though he might not be rightfully in office. In this the court but followed its own well considered holding, by all the judges, in *Griffin v. Cunningham*, 20 Gratt., 31, approved in *Quinn v. Commonwealth*, 20 Gratt., 138, and *Teel v. Yancy*, 23 Gratt., 691, and the repeated decisions of this court. *Texas v. White*, 7 Wall., 733 [74 U. S., XIX., 240]; *Thorington v. Smith*, 8 Wall., 8 [75 U. S., XIX., 363]; *Huntington v. Texas*, 16 Wall., 412 [83 U. S., XXI., 318]; *Horn v. Lockhart*, 17 Wall., 580 [84 U. S., XXI., 660].

It follows that the motion to dismiss for want of jurisdiction must be granted.

Cited—10 Blss., 463.

THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY AND MUSCATINE COUNTY; *Appts.*,

v.

CHARLES T. CROMWELL.

(See S. C., 1 Otto, 643-646.)

Court of equity, when will not act.

Courts of equity will not aid contrivances to gain a contingent or speculative advantage. They will never lend their aid to carry out an unconscionable bargain, but will leave the party to his remedy at law.

[No. 51.]

Submitted Nov. 18, 1875. Decided Jan. 24, 1876.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Messrs. G. G. Wright & R. P. Lowe and Jas. Grant, for appellants.

Mr. Jno. N. Rogers, appellee.

Mr. Justice Bradley delivered the opinion of the court:

The bill in this case was filed in the court below by the appellee, Cromwell, against the appellants, the Mississippi and Missouri Railroad Company, and Muscatine County, of the State of Iowa, to compel the former to transfer to the complainant on its books, and to issue to him a certificate for, seventeen hundred and fourteen shares of its capital stock standing in the name of Muscatine County, which stock the complainant claims to have purchased at an execution sale made by the Marshal of the United States for the District of Iowa.

It is conceded that one James F. Harrison, of New York, in October, 1867, recovered a judgment in the Circuit Court of the United States for the District of Iowa against Muscatine County, for \$6,500, upon the coupons attached to certain bonds issued by that county in 1854, being a portion of \$150,000 of bonds issued in payment of its subscription for said stock; and that, under an execution on said judgment in October, 1868, the marshal assumed to levy on said stock, and on the 23d of December, 1868, sold the same at public auction in the City of Des Moines; and that the complainant, Cromwell, became the purchaser for the sum of \$50; and that the marshal executed to him a bill of sale accordingly.

The appellants question the validity of the levy made by the marshal, on the ground that the stock was not located in Iowa, but in the City of New York, and could not be levied on in the district of Iowa. Without attempting to decide this point, we will proceed to the examination of other grounds of defense more directly bearing upon the title to equitable relief.

The certificates of the stock had been deposited, in June, 1866, with the Union Trust Company in the City of New York, in pursuance of an agreement by which the stockholders and bond holders of the Mississippi and Missouri Railroad Company had arranged for a formal judicial sale of the railroad of said Company under the foreclosure of a mortgage to the Chicago, Rock Island and Pacific Railroad Company. By this agreement, the stockholders consenting and depositing their stock as aforesaid, were to receive sixteen per cent. of the par value thereof, either in money or in the bonds of the Chicago, Rock Island and Pacific Railroad Company; making the amount to be received by the County of Muscatine for its stock about \$27,400, with interest from Dec. 1, 1865. The deposit of the stock held by the county under this arrangement entitled it to this sum. In this state of things, certain creditors of the Railroad Company (including said Harrison) filed a bill in the Circuit Court of the United States for the District of Iowa, claiming that the arrangement was a fraud on their rights, and that the sixteen per cent. which the stockholders had stipulated for, ought to be given up to them in payment of their demands as far as it would go for that purpose. This claim was sustained by the court; and a decree to that effect was made in May, 1868, before the issuing of Harrison's execution under which the stock was sold. The total amount of the sixteen per cent. reserved to the stockholders, after deducting their share of the expenses, was \$541,000; and the total amount of the claims of creditors, to which the money was by the said decree appropriated, was nearly \$800,000; more than sufficient to absorb the whole of it.

Now, as the stock of the Mississippi and Missouri Railroad Company, by the foreclosure and sale of all its property under the mortgage, had become completely valueless, if it had not ceased to exist for any purpose except the reception of the sixteen per cent. before mentioned, and as that sixteen per cent. was also entirely absorbed and taken away by the outside creditors of the Company under this decree, it would appear that the subsequent levy on and

sale of the stock belonging to Muscatine County was a vain and useless transaction. The property of the Company was gone; its franchises were gone; the amount which the stockholders had arranged to realize was gone; and consequently, the stock could have been nothing but an empty name, and the attempt to keep it afloat for speculative purposes is not such as should recommend it to a court of equity. The parties to such a transaction ought at least to be left to their remedies at law. A court of equity should have no sympathy with any such contrivances to gain a contingent or speculative advantage, if any such is to be gained.

On the other hand, if, as intimated by the counsel, there is a contingency of obtaining the sixteen per cent. appropriated to this stock by the arrangement made between the two railroad companies, now amounting to over \$32,000, the case stands on no better grounds to recommend it to the special interposition of the court. This result cannot be attained without in some way depriving the County of Muscatine of that sum. If by payment of the county bonds, or in any other way, the sixteen per cent. becomes liberated from the decree, the County will be equitably entitled to the money, unless Cromwell, the appellee, has a better equity. To him it will be a windfall, like a prize in a lottery. He paid no adequate consideration to entitle him to claim it as a matter of equity. If the law gives it to him, he should seek his remedy at law. Equity will not lend its aid to any such games of hazard. The levy on the stock and the formal sale of it by Harrison, after having with other creditors obtained a decree for appropriating the sixteen per cent. due on it, was evidently not done for the honest purpose of making his debt by the sale, or he would not have allowed it to be sold for \$50. The object must have been to get, by the forms of sale, some ulterior unconscionable advantage by the possession of the stock. The purchaser, Cromwell, stands in no better position. He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of \$30,000 worth of stock for which he paid only \$50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law. This has been so often held on bills for specific performance, and in other analogous cases, that it is unnecessary to spend argument on the subject.

Decree reversed and cause remanded, with directions to dismiss the bill of complaint.

Cited—47 Mich., 654; 41 Am. Rep., 721.

ROBERT DOW, *Ptff. in Err.*,
v.

DAVID HUMBERT ET AL.

(See S. C., 1 Otto, 294-308.)

Variance in proof—town officers, liability of—nominal damages.

1. On the plea of *nulla record* of a judgment of the Circuit Court for the District of Wisconsin, a judgment of the Circuit Court for the Eastern Dis-

dict of Wisconsin is not evidence of such a judgment.

2. Town officers, by the mere failure to place on the tax list, when it was their duty to do so, a judgment recovered by plaintiff against the town, did not become thereby personally liable to plaintiff for the whole amount of said judgment, without any other evidence having been produced, of loss or damage growing out of such failure.

3. In the absence of any proof of actual damage, such officers are liable to only nominal damages and to costs.

[No. 86.]

Submitted Dec. 14, 1875. Decided Jan. 31, 1876.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

This was an action brought in the court below by Dow, the plaintiff in error, to recover damages of the defendants in error, for neglect of their official duty as Supervisors of the Town of Waldwick, Wisconsin, in failing to make an order for the insertion of the amount of a certain judgment of plaintiff in the tax-roll of the town.

The case is stated by the court.

Messrs. Matt. H. Carpenter and E. Mariner, for plaintiff in error:

The variance in the title of the court, between the record offered and the complaint and notice, could not mislead.

There is no pretense that there was any other judgment against the Town of Waldwick, of that date and amount, than the one set out in the complaint and specified in this notice.

Nash v. Towne, 5 Wall., 689 (72 U.S., XVIII., 527); *The Mayor v. Lord*, 9 Wall., 409 (76 U.S., XIX., 704).

Section 88, ch. 125, Rev. Stat. of 1858, provides that no variance between the allegation in a pleading and the proof shall be deemed material, unless it shall actually mislead, etc.

The court erred in admitting the proceeding of the County Board, dividing the town, in mitigation of damages. There is no claim for punitive damages. The duty neglected by the defendant was the substantial act to be done in collecting the debt.

Mayor v. Lord, 9 Wall., 411 (76 U.S., XIX., 706); *State v. Gates*, 22 Wis., 210.

The refusals to charge and the charge given enunciate substantially the same proposition: that only nominal damages can be recovered on the evidence.

On this question see, *O'Connell v. Regina*, 11 Cl. & F., 156; *Com. v. Contner*, 18 Pa., 489; *Harris v. Kirkpatrick*, 85 N. J., 392; *Kemp v. Williams*, 43 Ga., 211; *Hootman v. Shriner*, 15 Ohio St., 43; *Dunphy v. Whipple*, 25 Mich., 10; *Ledyard v. Jones*, 7 N. Y., 550; *Weld v. Bartlett*, 10 Mass., 470; *Noxen v. Hill*, 2 Allen, 215; *Metcalf v. Stryker*, 31 N. Y., 255; *Eaton v. Ogier*, 2 Me., 46; *Amy v. Supervisors*, 11 Wall., 136 (78 U.S., XX., 101); *Robinson v. Chamberlain*, 84 N. Y., 389; *Hover v. Barkhoof*, 44 N. Y., 113; *Mersey Docks v. Gibbs*, 3 Hurl. & C., 1035, Am. ed.; *King v. Bk. of Eng.*, Doug., 524; *Healy v. Mayor of Lyme*, 5 Bing., 91.

The undenied allegation of the complaint is, that if the defendants had made the order, the plaintiff would have had the money upon his judgment. January 31, 1872, the return day of the treasurer's warrant, to collect the tax in which, in our judgments, it should have been put. The damage the plaintiff suffered was

not receiving his money on that day. It can only be compensated for by recovering the money. It is no compensation to the plaintiff to be turned away with the assurance that "The town is good," and these defendants can yet cause the tax to be levied and collected, if they see fit.

If these defendants can escape with nominal damages for disregarding and disobeying the law, for the reason that the town is good and the tax can still be collected, every other Board of Supervisors can so escape.

Kortright v. Bk., 20 Wend., 91; *S. C.*, 22 Wend., 348; *Neff v. Webster*, 15 Wis., 283; *Manny v. Dunlap*, Woolw., 372; *Clark v. Miller*, 47 Barb., 38; *S. C.*, 54 N. Y., 528.

Mr. D. D. Lord, for defendants in error.

Mr. Justice Miller delivered the opinion of the court:

The defendants are sued by plaintiff for a failure to perform their duty as Supervisors of the Town of Waldwick, in the County of Iowa, Wisconsin, in refusing to place upon the tax-list the amount of the judgments recovered by him against that town. By the statutes of Wisconsin, no execution can issue against towns on judgments rendered against them; but the amounts of such judgments are to be placed, by order of the Supervisors, on the next tax-list for the annual assessment and collection of taxes; and the amount so levied and collected is to be paid to the judgment creditor, and to no other purpose.

The declaration avers due notice served on the Supervisors, of these judgments, and demands that they be so placed on the tax-list. The first judgment is described in the declaration as rendered in the Circuit Court for the District of Wisconsin, on the 27th October, 1870, for \$708.90; and the notice to the Supervisors, set out in the declaration, uses the same language. The other judgment is described as rendered in the Circuit Court for the Western District of Wisconsin, June 10, 1871, for the sum of \$1,531.56.

The answer of the defendants denies that there is any such judgment as that first described; and, as to the second judgment, they say that, after it was rendered, the Town of Waldwick was divided, and a part of it organized into the new Town of Moscow; that thirty-seven per cent. of the judgment was collectible from that town; and that it was not the duty of the defendants to levy the whole judgment on the property of the citizens of Waldwick.

On these issues the parties went to trial before a jury. In support of the issue as to the existence of the first judgment, plaintiffs introduced a copy of a record of a judgment between the same parties for the same amount, and of the same date as that described in the declaration, in the Circuit Court for the Eastern District of Wisconsin; to which defendants objected, because it varied from the judgment described in the declaration, and in the notice given to defendants to place it on the tax-list. The court sustained the objection, and this ruling is the ground of the first assignment of errors. The argument of counsel on this branch of the case rests mainly on the ground of the sufficiency of the notice to the Supervisors. But the question before that is, whether such a judgment

was admissible under the pleadings as they stood. There had been for many years a Circuit Court for the District of Wisconsin. Shortly before this judgment was rendered the district was divided into two districts, and the circuit courts were, by the express language of the Act of Congress, called the Circuit Court for the Eastern District and the Circuit Court for the Western District respectively. There was no such court in existence at the date of the judgment offered as the Circuit Court for the District of Wisconsin, and the defendants were justified in pleading *nul tiel record* to a declaration founded on a judgment of that date in that court; and, on this issue as it stood when the record of a judgment in the Circuit Court for the Eastern District was offered, it did not prove a judgment in the Circuit Court for the District of Wisconsin.

If plaintiff had asked leave to amend his declaration by inserting the word "eastern" before "district" in his first count, in describing his judgment, it would no doubt have been granted; and the question would then have arisen as to the sufficiency of notice to the Supervisors, the notice containing the same mistake: but, on the plea of *nul tiel record* of judgment of the Circuit Court for the District of Wisconsin, it is clear a judgment of the Circuit Court for the Eastern District of Wisconsin is not evidence of such a judgment.

Plaintiff having introduced a record of his judgment for \$1,531.56 in the Western District of Wisconsin, and notice and demand as to that to the Supervisors, the defendants were permitted, as the court said, solely in mitigation of damages, to offer the record of the division of the township, and resolutions of the Board, adopted after this suit was brought, directing the town clerk to place this latter judgment, with its interest, on the tax-list in November, 1872; to which exceptions were taken, and this constitutes the ground of the second and third assignments of error. They will be considered in connection with the fourth and last assignment.

This being all the testimony, plaintiff requested the court to charge the jury that the plaintiff was entitled to recover of the defendants the amount of both these judgments, with interest from their date; and, this being refused, he asked the same instruction as to the second judgment, which was refused. Exceptions were taken to both these refusals, and to the following language in the charge which the court did deliver.

"The jury are instructed upon the whole evidence in the case, that the plaintiff is entitled to recover nominal damages from the defendants by reason of their failure to direct the levy of the tax in question. The plaintiff is not entitled to recover any more, because he has not shown that he has suffered any injury from the neglect or omission of the defendants to cause the clerk to put the judgment on the next tax-roll of the town."

The whole case turns upon the soundness of this latter instruction, representing, as it does, the converse of that which the plaintiff asked, and which was refused; and the single question presented is, whether these officers, by the mere failure to place on the tax list, when it was their duty to do so, the judgment recovered by plaintiff against the town, became

thereby personally liable to plaintiff for the whole amount of said judgment, without producing any other evidence of loss or damage growing out of such failure.

It is not easy to see on what principle of justice the plaintiff can recover from defendants more than he has been injured by their misconduct.

If it were an action of trespass, there is much authority for saying that plaintiff would be limited to actual and compensatory damages, unless the act were accompanied with malice or other aggravating circumstances. How much more reasonable that, for a failure to perform an act of official duty, through mistake of what that duty is, plaintiff should be limited in his recovery to his actual loss, injury or damage.

Indeed, where such is the almost universal rule for measuring damages before a jury, there must be some special reason for a departure from it.

In the case before us, it must be presumed that the taxable property of Waldwick Township remains to-day as it was when the levy should have been made; that a levy this year would as surely produce the money as if it had been made last year. The debt is not lost. The right to recover remains. The property liable to its satisfaction, and the means of subjecting it to that use, are still open to plaintiff. The only loss, then, is the delay, unless it may be the cost and expense of the unavailing effort to have the debt levied on the tax of the previous year; and this, if proved, could have been recovered under the instructions. For mere delay in paying a moneyed demand, the law has long recognized interest as the only damages to be recovered; and this interest is by law added to the assessment when placed on the tax list. If A, by the highest class of express contract, say a promissory note or bond, promise to pay B \$10,000 on a day fixed, and fail to do it, B can only recover interest for the delay, though he may have depended on that money to save his homestead from sacrifice, and has lost it by reason of that failure. So a man buying real estate may improve, adorn and have it grow in his hand to a value ten times what he gave for it; but if he loses all this by a failure of his title, he can only recover of the warrantor the sum which he gave for the land. These are apparent hardships. But wisdom and experience have shown that the danger of holding persons liable for these remote consequences of the violation of their contracts is far more serious in its consequences than occasional failure of full compensation by the application of the rule of interest for delay, and of the purchase money in a suit on a warranty of title to lands.

"Damages," says Mr. Greenleaf, "are given as a compensation, recompense or satisfaction to the plaintiff for any injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less, and this whether it be to his person or estate." 2 Greenl. Ev., sec. 253. And without entering into the question whether this rule excludes what are called exemplary damages, which are not claimed here, we think this definition of the principle on which damages are awarded in actions at law a sound one.

The expense and cost of the vain effort to have the judgment placed on the tax-list: the loss of the debt, if it had been lost; any impairment of the efficiency of the tax levy, if such there had been; in short, any conceivable actual damage—the court would have allowed if proved. But plaintiff, resting solely on his proposition that defendants by failing to make the levy had become his debtors for the amount of his judgment, asked for that and would accept no less.

Counsel for plaintiff relies mainly on the class of decisions in which sheriffs have been held liable for the entire judgment for failing to perform their duty when an execution has been placed in their hands. The decisions on this subject are not harmonious; for while it has been generally held that on a failure to arrest the defendant on a *capias*, or levy an execution on his property, or to allow him to escape when held a prisoner, the amount of the debt is the presumptive measure of damages, it has been held in many courts that this may be rebutted or the damages reduced by showing that the prisoner has been re-arrested, or that there is sufficient property subject to levy to satisfy the debt, or other matter, showing that the plaintiff has not sustained damages to the amount of the judgment. This whole subject is fully discussed and the authorities collated in Sedg. Dam., 506-525; *Richardson v. Spencer*, 6 Ohio, 13. But, without going into this disputed question, we are of opinion that those cases do not furnish the rule for the class to which this belongs.

The sheriff, under the law of England, was an officer of great dignity and power. He was also custodian of the jail in which all prisoners, whether for crime or for debt, were kept. He had authority in all cases when it was necessary to call out the whole power of the county to assist him in the performance of his duty. The principle of the sheriff's liability here asserted originated, undoubtedly, in cases of suit for an escape. Imprisonment of the debtor was then the chief if not the only mode of enforcing satisfaction of a judgment for money. It was a very simple, a very speedy and a very effectual mode. The debtor being arrested on a *capias*, which was his first notice of the action, was held a prisoner, unless he could give bail, until the action was tried. If he gave bail and judgment went against him, his bail must pay the debt, or he could be re-arrested on a *capias ad satisfaciendum*; and, if he had given no bail, he was holden under this second writ until the money was paid. To permit him to escape was, in effect, to lose the debt; for his body had been taken in satisfaction of the judgment. Inasmuch as the object of keeping the defendant in prison was to compel the payment of the debt through his desire to be released, the plaintiff was entitled to have him in custody every hour until the debt was paid.

It is also to be considered, that, for every day's service in keeping the prisoner, the sheriff was entitled to compensation by law at the hands of the creditor. *Williams v. Mostyn*, 4 M. & W., 133; *Williams v. Griffith*, 3 Exch., 384; *Wyllie v. Birch*, 4 Q. B., 588; *Clifton v. Hooper*, 6 Q. B., 468.

With the means in the hands of the sheriff for safe-keeping and re-arrest, with the escape

of the debtor almost equivalent to a loss of the debt, and with compensation paid him by plaintiff for his service it is not surprising that, when he negligently or intentionally permitted an escape, he should be held liable for the whole debt.

How very different the duties of the class of officers to which defendants belong, and the circumstances under which their duties are performed! There is no profit in the office itself. It is undertaken mainly from a sense of public duty; and, if there be any compensation at all, it is altogether disproportionate to the responsibility and trouble assumed. They are in no sense the agents of creditors, and receive no compensation from holders of judgments or other claims against the town for the collection and payment of their debts. There are no prisons under their control; no prisoners committed to their custody; no *posse comitatus* to be brought to their aid; but without reward, and without special process of a court to back them, they are expected to levy taxes on the reluctant community at whose hands they hold office. To hold that these humble but necessary public duties can only be undertaken at the hazard of personal liability for every judgment which they fail to levy and collect, whether through mistake, ignorance, inadvertence or accident, as a sheriff is for an escape, without any proof that the judgment creditor has lost his debt, or that its value is in any manner impaired, is a doctrine too harsh to be enforced in any court where imprisonment for debt has been abolished.

The case of *King v. Bk.*, 2 Doug., 524, is cited as sustaining the plaintiff in error. It was an application for a *mandamus* to compel the governor and company of the Bank of England to transfer stock of the bank. The writ was denied on several grounds; among which, as a suggestion, Lord Mansfield said that "Where an action will lie for complete satisfaction (as in that case), equivalent to a specific relief, and the right of the party applying is not clear, the court will not interpose the extraordinary remedy of a *mandamus*." He then shows that the right of the party in that case to have the transfer made was not clear. As this was not an action against the officers of the bank for damages, the remark that there was other relief is only incidental, and the point as to the measure of damages was not in issue.

A note to the principal case shows that an action of *assumpsit* was afterwards brought and compromised before final judgment. But on the whole case there is no discussion of the measure of damages; and that question remained undecided. The case of *Clark v. Miller*, 54 N. Y., 528, decided very recently in the commission of appeals, appears to be more in point. It was an action against the Supervisor of the Town of Southport, Chemung County, for refusing to present to the Board of Supervisors of the county plaintiff's claim for damages as re-assessed for laying out a road through his land.

The court, without much discussion of the principle holds the defendant liable for the full amount of the re-assessment, on the authority of *Bk. v. Kortright*, 22 Wend., 348.

That case was decided in the Court of Errors in 1839. It was an action for refusing to make a transfer of stock of the bank. The chancellor

(Walworth) was of opinion that the extent of the damages was the depreciation of the stock, and not its full value; and of this opinion were four senators.

In the case of *People v. Richmond Co.*, 28 N. Y., 112, also before the court in 20 N. Y., 252, the relator had sued out a writ of *mandamus* requiring the supervisors to audit his claim for damages assessed for land taken as a highway. The supervisors made a return to the writ; which proving false, the Supreme Court rendered a judgment against them personally for the claim of \$200, and for \$84 damages for delay. The Court of Appeals said that, as the return of the supervisors was false, and the relator has been kept out of the money to which he was entitled from the town, the supervisors may be properly made liable in damages to the extent of the interest upon the \$200, to wit: \$84; and they affirm the judgment as to the \$84, and reverse it as to the \$200, for which they order a peremptory writ of *mandamus*.

This answer accords precisely with our views; and we think it of equal authority with *Clark v. Miller*, above cited.

We are of opinion that, in the absence of any proof of actual damage in this case, the defendants were liable to nominal damages and to costs, and no more.

If we are correct in this, the evidence of the division of the township, and that the Supervisors had actually placed the judgment of plaintiff in the tax-list of the next year, were properly received in mitigation; at all events, did him no harm, as he had proved no actual loss or injury.

The judgment of the Circuit Court is affirmed.

Mr. Justice Clifford, dissenting:

I dissent from the opinion and judgment of the circuit court in this case, because the instruction given by the circuit court to the jury was erroneous. Plaintiffs were entitled at least to the actual damages sustained by them in view of the whole evidence. Unless the plaintiffs in such a case may recover something more than nominal damages, the debt becomes valueless, as the same conduct by the Supervisors may be repeated indefinitely, and the rule necessarily leads to practical repudiation.

Also dissenting, *Mr. Justice Hunt*.

Cited—7 Biss., 100.

UNITED STATES, *Appt.*,

v.

WILLIAM ALLISON.

(See S. C., 1 Otto, 303-308.)

Additional pay—"20 per cent. case."

An *employé* in the government printing-office is not entitled to additional compensation for his services, under the Joint Resolution of Feb. 28, 1867.

[No. 643.]

Submitted Jan. 3, 1876. Decided Jan. 31, 1876.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellant.

Messrs. James A. Garfield and *J. Daniels*, for appellee.

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Mr. Chief Justice Waite delivered the opinion of the court:

Allison was an *employé* in the government printing office from June 30, 1866, to June 30, 1867, and, in this suit, claims additional compensation for his services in consequence of the Joint Resolution of February 28, 1867. 14 Stat. at L., 569. He contends that the government printing-office was, during the fiscal year commencing July 1, 1866, a bureau in the Department of the Interior. If it was not, he substantially concedes that he is not entitled to the benefit of the Resolution.

The Department of the Interior is one of the Executive Departments of the Government. R. S., sec. 437. It was made so March 3, 1849. 9 Stat. at L., 395. It is specially charged with the supervision of certain executive bureaus. Its present jurisdiction is defined in sec. 441, R. S. The government printing-office has never been placed under its jurisdiction by any express statute.

On the 26th August, 1852, Congress passed an Act entitled "An Act to Provide for Executing the Public Printing and Establishing the Prices Thereof, and for Other Purposes." 10 Stat. at L., 80. It is only necessary to say of this Act, that it provided for the appointment of a Superintendent of Public Printing, and that he was to give an official bond to be approved by the Secretary of the Interior. His duties were carefully defined; and he was made in fact, what his names implies, the Superintendent of the Public Printing by the public printers. These public printers were, at that time, appointed by the two Houses of Congress, each House appointing its own.

On the 23d of June, 1860, a Joint Resolution was passed by Congress in relation to the public printing. 12 Stat. at L., 117. This Resolution dispensed with the public printers appointed by the two Houses of Congress, and placed the whole subject of public printing in charge of the superintendent. In the language of the Resolution, sec. 2, he was "To superintend all the printing and binding, the purchase of paper, * * * the purchase of other necessary materials and machinery, and the employment of proof-readers, compositors, pressmen, laborers, and other hands necessary to execute the orders of Congress and of the Executive and Judicial Departments at the City of Washington." To enable him more effectually to perform his duties, he was to appoint a foreman of printing and a foreman of binding. These foremen were required to report to him, and to furnish him their estimates of the amount and kind of material required. He furnished them their supplies, for which they accounted to him. He was also to report to Congress at the beginning of each session the number of hands employed, and the length of time each had been employed; and by section 9 it was made his duty to report to Congress "The exact condition of the public printing, binding and engraving; the amount and cost of all such printing, binding and engraving; the amount and cost of all paper purchased for the same; a statement of the several bids for materials; and such further information as may be within his knowledge in regard to all matters connected therewith." By section 8 he was required to render to the Secretary of the Treasury, quarterly, a full account of all

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purchases made by him, and of all printing and binding done in his office for each of the Houses of Congress and for each of the Executive and Judicial Departments. The Secretary of the Treasury was also authorized to advance money to him on account, and he was to settle his accounts of receipts and disbursements in the manner then required of other disbursing officers. By section 9 it was made the duty of the superintendent, annually, to prepare and submit to the Register of the Treasury, in time to have the same embraced in the general estimates from that department, detailed estimates of salaries and other necessary expenses of the printing establishment for the second year. By section 7 the joint committee on printing for the two Houses of Congress was directed to fix upon a standard of paper for the printing of congressional documents. The superintendent was to advertise for proposals to furnish the Government all paper necessary for the execution of the public printing, and to furnish samples of the standard paper to applicants therefor. The bids were to be opened by him in the presence of the Secretary of the Senate and the Clerk of the House of Representatives, and he was required to award the contract to the lowest bidder. All differences in opinion between the superintendent and the contractors were to be settled by the joint committee on printing of the two Houses. Whenever engraving was required to be done to illustrate any document ordered to be printed by either House of Congress, the superintendent was to procure it to be done under the supervision of the committee on printing of the House making the order. Sec. 8. By section 7 it was provided that, if the contractor for furnishing paper failed to make his deliveries, the superintendent might purchase for temporary supply in the open market, by and with the approval of the Secretary of the Interior. He was also, by the same section, to render to the Secretary of the Interior, at the end of each fiscal year, an account of all paper received from contractors, and of all paper used for the purposes of the Government under that Act; and also the amount of each class consumed in the printing establishment, and in what works the same were used. Defaults by contractors in furnishing paper under their contracts were to be reported by the superintendent, with a full statement of all the facts, to the Solicitor of the Treasury for prosecution.

The commissions of all officers under the direction or control of the Secretary of the Interior must be made out and recorded in the Department of the Interior, and the seal of the department must be affixed thereto. 10 Stat. at L., 297, sec. 8. The court below has found as a fact, that "In 1867 the commission of the Superintendent of Public Printing was made out and recorded in the Department of the Interior, and the seal of the department affixed thereto, pursuant to the provisions of" this Act. It nowhere appears that any Act of Congress expressly required this to be done; neither does it appear at what time in the year 1867 this commission was issued or recorded.

On the 22d February, 1867, Congress passed an Act entitled "An Act Providing for the Election of the Congressional Printer." By this

See 1 Otto.

U. S., Book 28.

Act, the Senate was to elect some competent person "to take charge of and manage the government printing-office." He was given the same powers as the Superintendent of Public Printing. From and after the election of the congressional printer, the office of Superintendent of Public Printing was abolished. 14 Stat. at L., 398. The Senate elected a congressional printer in pursuance of this Act, Feb. 26; but he did not take possession of his office until March 1, and the superintendent continued to act until that time. The superintendent was acting on the 28th February, when the resolution under which Allison claims was passed.

In *Manning's* case, 13 Wall., 578 [80 U. S., XX, 706], it appeared that the guards of the jail in the District of Columbia were selected by the warden, but that their compensation was fixed and paid by the Secretary of the Interior. It also appeared that the whole subject of the jail was under the supervision of the Secretary, to whom the warden was required to report. Under these circumstances, we held that the office of the warden of the jail was a Bureau or division of the Department of the Interior.

This is as far as any case has yet gone. The Secretary of the Interior has no control whatever over the employment of men by the Superintendent of Public Printing. He cannot fix their wages or supervise the action of the superintendent in that particular. He does not pay them, and has no control whatever of the funds out of which they are paid. He may pay the superintendent for printing done upon the order of his department; but the superintendent disburses without any accountability to him. In short, the superintendent seems to have a department of his own, in which he is in a sense supreme. Certainly he is not under the control of any one of the Executive Departments. Apparently he is more responsible to Congress than to any other authority. The Secretary of the Interior keeps and approves his bond. The same Secretary must, under some circumstances, approve his purchases of paper in open market. He sends to that department also his accounts of the receipts and disbursements of paper. The joint committee on printing in the two Houses of Congress settle all disputes between him and his contractors for the delivery of paper. He reports to Congress in respect to his *employés*, and to the Secretary of the Treasury in respect to his receipts and disbursements. From that department also he draws his money upon proper requisitions. He is under the direction of the committees of each House of Congress in respect to engraving, and he goes to the Secretary of the Treasury with his estimates.

In our opinion, his *employés*, as they are not specially enumerated, are not included in the Resolution of Feb. 28, 1867; and, on that account, this claim cannot be maintained.

The view we have taken of this case makes it unnecessary to consider the effect of the election of a congressional printer on the 26th February, 1867.

The judgment of the Court of Claims is reversed and the cause remanded, with instructions to dismiss the petition.

MARIA ROMIE ET AL., *Plffs. in Err.*,

v.

TERESA CASANOVA.

(See S. C., 1 Otto, 379-381.)

Federal question, what is not.

No federal question is presented in an action to recover possession of certain lands, when both parties claim title from the same public source, and both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it.

[No. 127.]

Submitted Jan. 28, 1876. Decided Jan. 31, 1876.

IN ERROR to the Supreme Court of the State of California.

The case is sufficiently stated by the court.

Messrs. S. O. Houghton and J. H. Reynolds, for plaintiffs in error.

Mr. John A. Grow, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

No federal question is presented by the record in this case. The action was brought to recover the possession of certain lands. Both parties claimed title from the City of San Jose; and the question to be determined was, which of the two had actually obtained a grant of the particular premises in controversy. The title of the city was not drawn in question. It is said that depended upon the Treaty of Guadalupe Hidalgo and the several Acts of Congress to ascertain and settle private land claims in California but this does not appear in the record. Even if it did, the case would not be different, for both parties admit the title of the city, and their litigation extends only to the determination of the rights which they have severally acquired under it.

The writ is dismissed.

Cited—22 U. S., 724; 3 Wood, 61; 4 Sawy., 181.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *Plff. in Err.*,

v.

MARY A. F. ARMS ET AL.

(See S. C., 1 Otto, 489-495.)

Exemplary damages—when given.

1. Exemplary damages may in certain cases be assessed, but in an action for injury by defendant's negligence, when there is no proof that the injury was inflicted maliciously or wantonly, exemplary damages are not recoverable.

2. Gross negligence is a relative term, and means the absence of the care that was necessary under the circumstances; but the absence of this care alone, whether called gross or ordinary negligence, does not authorize the jury to give damages beyond the limit of compensation for the injury actually inflicted.

[No. 105.]

Argued Jan. 6, 7, 1876. Decided Jan. 31, 1876.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Mr. John W. Cary, for plaintiff in error:

The district judge erred in charging the jury as follows:

"If you find that the accident was caused by the gross negligence of the defendant's servant controlling the train, you may give to the plaintiff punitive or exemplary damages."

The giving of this instruction was erroneous.

1. Because there was no testimony which would warrant the judge in submitting the question of gross negligence to the jury for any purpose unless the fact that two railroad trains collided is, *ipso facto*, evidence from which a jury are to infer gross negligence.

2. There is no well considered case that holds that mere negligence is a ground for awarding punitive damages against anyone. Negligence may be slight, ordinary or gross; still, if it is mere negligence, unmixed with gross fraud, malice, willfulness, wanton recklessness or oppression, punitive damages cannot be allowed. Willful negligence will warrant exemplary damages against the persons guilty of it, but in such a case it is necessary to show by proof that the negligence was willful; in other words, intentional. There was in this case no proof of the kind.

3. The charge was: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages." This is the only case, so far as I am aware, where the court has ever charged that if the servants were negligent, punitive damages might be awarded against the master. See, *The Amiable Nancy*, 8 Wheat., 546; *R. R. Co. v. Derby*, 14 How., 468; *R. R. Co. v. Quigley*, 21 How., 202 (62 U. S., XVI., 73); *R. R. Co. v. Finney*, 10 Wis., 388; *Oraker v. R. Co.*, 86 Wis., 657; *Cleghorn v. R. R. Co.*, 56 N. Y., 44; *Hamilton v. R. R. Co.*, 53 N. Y., 25; *Weed v. R. R. Co.*, 17 N. Y., 362; *Hagan v. R. R. Co.*, 3 R. I., 88; *Ackerson v. R. Co.*, 33 N. J., 254; *N. R. R. Co. v. Statham*, 42 Miss., 607; *Turner v. R. R. Co.*, 84 Cal., 594; *Wardrobe v. California Stage Co.*, 7 Cal., 118; *Moody v. McDonald*, 4 Cal., 297; *DuLaurans v. First Dir. of St. Paul & P. R. R. Co.*, 15 Minn., 49; *Detroit Dai. Post Co. v. McArthur and Dai. F. P. Co. v. Same*, 16 Mich., 447; *R. R. Co. v. Miller*, 19 Mich., 805, 315; *R. R. Co. v. Stusser*, 19 Ohio St., 157; *R. R. Co. v. Dunn*, 19 Ohio St., 162, are decided by three judges against two in favor of allowing punitive damages, in a proper case against the Company for the malice of the employé. At page 590 of same volume is found the dissenting opinion of the minority.

R. R. Co. v. Kelly, 31 Pa., 372; *Hail v. Glanding*, 42 Pa., 493; *Hill v. R. R. Co.*, 11 La. Ann., 292; *R. R. Co. v. McKean*, 40 Ill., 218; *R. R. Co. v. Smith*, 2 Duv., 556; *R. R. Co. v. Dills*, 4 Bush, 593.

The doctrine contended for by the defendants in error, and which was adopted in the court below in this case, has been adopted by some of the state courts. The leading case is that of *Goddard v. R. R. Co.*, 57 Me., 202. The judge at the circuit court in that case refused to instruct the jury that if the acts and words of the defendant's servants were not directly or impliedly authorized or ratified by the defendant, the plaintiff could not recover exemplary damages, and this ruling was sustained in the Supreme Court, and the opinion seems to hold that

a different rule from that applicable to natural persons, or other corporations even, should be applied to railroad corporations. Similar decisions have been made in N. H. and in Miss. These decisions all appear to proceed upon the basis that the subordinate agents or *employés* of a railroad are the company, and that their acts are to be taken as the acts of the company, making no distinction between them and the general officers, responsible controlling agents of the company, and that their carelessness or malice is the malice of the company. In the reasoning of these cases, there is no such relation as employer and *employé*, or master and servant, where a railroad company is concerned, and this relation, with its duties and consequences, is ignored. This view of the case is wholly in conflict with the authorities I have cited.

Mr. Justice Grover, in the case of *Hamilton v. R. R. Co.*, 53 N. Y., 29, referring to this matter, says: "It is obvious that no distinction can be made in respect to this liability, whether the master be a natural or artificial person."

Mr. C. C. Nourse, for defendants in error:

It is to be considered simply whether, in any case of gross carelessness unaccompanied with any pretense of palliating circumstances or excuse, a railroad company would be liable for exemplary or punitive damages.

It is to be observed also that gross negligence, where the highest degree of care is required, should be, and from motives of public policy is, in fact, regarded as criminal, and many instances are found in the elementary works on criminal law, where gross negligence is punished as a crime. Whart. Am. Cr. L., sec. 1002 *et seq.*; *R. R. Co. v. Derby*, 14 How., 468.

The case of *Whipple v. Walpole*, 10 N. H., 130, is to the point that exemplary damages may be allowed by the jury in case of gross negligence, and the same point has been fully settled in that State in actions against railroad corporations.

Hopkins v. R. R. Co., 36 N. H., 9; *Taylor v. R. Co.*, 48 N. H., 804, 818.

The case of *Goddard v. R. R. Co.*, 57 Me., 202, is also a well considered case, and in point as to exemplary damages against railroad corporations. This case is also reported in 10 Am. L. Reg., 17, where many authorities are cited, and to which Judge Redfield adds a valuable note of approval.

See, also, Redf. Railw., 515 *et seq.*; Sherm. & Redf. Neg., sec. 600; *R. R. Co. v. Allbritton*, 38 Miss., 242; *R. R. Co. v. Bailey*, 40 Miss., 395; *R. R. Co. v. Patton*, 31 Miss., 156; *R. R. Co. v. Whitfield*, 44 Miss., 466; *R. R. Co. v. Mahony*, 7 Bush (Ky.), 235; *R. R. Co. v. Dunn*, 19 Ohio St., 162; *R. R. Co. v. Slusser*, 19 Ohio St., 157; *R. R. Co. v. Books*, 57 Pa. St., 339; *R. R. Co. v. Blocher*, 27 Md., 277; *Varillat v. R. R. Co.*, 10 La. Ann., 88.

The liability of railway corporations for exemplary damages for willful negligence is also recognized in Illinois.

R. R. Co. v. McKean, 40 Ill., 218; *R. R. Co. v. Herring*, 57 Ill., 59; see, also, *Spicer v. R. R. Co.*, 29 Wis., 580.

The right of recovery of exemplary damages has been expressly recognized by this court.

Dwy v. Woodworth, 13 How., 363; *R. R. Co. v. Derby*, 14 How., 468; see, also, *Williamson*. See 1 Otto.

v. Western Stage Co., 24 Ia., 171; *Prink v. Coe*, 4 G. Greene (Ia.), 555; *Beale v. R. R. Co.*, 1 Dill. C. C. 568.

Mr. Justice Davis delivered the opinion of the court:

This action was brought to recover damages for the injuries received by Mrs. Arms by reason of a collision of the defendants' train of cars, upon which she was a passenger, with another train upon the same track moving in an opposite direction, which resulted in a verdict and judgment for \$4,000. The plaintiffs in error insist that they were severely dealt with in the court below, and that they are entitled to redress in this court.

The bill of exceptions discloses this state of facts: Mrs. Arms, in October, 1870, was a passenger on defendants' train of cars, which, while running at a speed of fourteen or fifteen miles an hour, collided with an engine on the same track. The jar occasioned by the collision was light, and more of a push than a shock. The fronts of the two engines were demolished, and a new engine removed the train. This was all the testimony offered by either party as to the character of the collision and the cause of it, but there was evidence tending to show that Mrs. Arms was thrown from her seat and sustained the injury of which she complained. After the evidence had been submitted to the jury, the court gave them the following instruction: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages."

The court doubtless assumed, in its instructions to the jury, that the mere collision of two railroad trains is, *ipso facto*, evidence of gross negligence on the part of the *employés* of the Company, justifying the assessment of exemplary damages; for a collision could not well occur under less aggravated circumstances, or cause slighter injury. Neither train was thrown from the track, and the effect of the collision was only to demolish the fronts of the two locomotives. It did not even produce the "shock" which usually results from a serious collision. The train on which Mrs. Arms was riding was moving at a very moderate rate of speed, and the other train must have been nearly, if not quite, stationary. There was nothing, therefore, save the fact that a collision happened, upon which to charge negligence upon the Company. This was enough to entitle Mrs. Arms to full compensatory damages; but the inquiry is, whether the jury had a right to go further, and give exemplary damages.

It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a general rule, the plaintiff recovers a mere compensation for his private injury, yet the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be recovered. As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of ex-

emplary damages cannot be reconciled with the idea that compensation alone is the measure of redress.

But jurists have chosen to place this doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; and, although the soundness of it has been questioned by some text writers and courts, it must be accepted as the general rule in England and in most of the States of this country. 1 Redf. Rw., 576; Sedg. Dam., 4th ed., ch. XVIII. and *note*, where the cases are collected and reviewed. It has also received the sanction of this court. Discussed and recognized in *Day v. Woodworth*, 13 How., 371, it was more accurately stated in *R. R. Co. v. Quigley*, 21 How., 213 [62 U. S., XXII, 77]. One of the errors assigned was that the circuit court did not place any limit on the power of the jury to give exemplary damages, if in their opinion they were called for. Mr. Justice Campbell, who delivered the opinion of the court, said:

"In *Day v. Woodworth* this court recognized the power of the jury in certain actions of tort to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act; the word implies that the wrong complained of was conceived in the spirit of mischief, or criminal indifference to civil obligations."

As nothing of this kind, under the evidence, could be imputed to the defendants, the judgment was reversed.

Although this rule was announced in an action for libel, it is equally applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

It is insisted, however, that, where there is gross negligence, the jury can properly give exemplary damages. There are many cases to this effect. The difficulty is, that they do not define the term with any accuracy; and, if it be made the criterion by which to determine the liability of the carrier beyond the limit of indemnity, it would seem that a precise meaning should be given to it. This the courts have been embarrassed in doing, and this court has expressed its disapprobation of these attempts to fix the degrees of negligence by legal definitions. In *The New World v. King*, 16 How., 474, Mr. Justice Curtis, in speaking of the three degrees of negligence, says:

"It may be doubted if these terms can be usefully applied in practice. Their meaning is not

fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances; to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms 'gross negligence' or 'ordinary negligence' which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned."

Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence. Redf. Car., sec. 376. Lord Cranworth, in *Wilson v. Brett*, 11 M. & W., 113, said that gross negligence is ordinary negligence with a vituperative epithet; and the Exchequer Chamber took the same view of the subject. *Beal v. R. Co.*, 3 H. & C., 337; *Grill v. Gen. Iron Screw Collier Co.*, L. R. 1. C. P., 1865-66, p. 600, was heard in the Common Pleas, on appeal. One of the points raised was the supposed misdirection of the Lord Chief Justice who tried the case, because he had made no distinction between gross and ordinary negligence. Justice Willes, in deciding the point, after stating his agreement with the *dictum* of Lord Cranworth, said:

"Confusion has arisen from regarding 'negligence' as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. 'Gross' is a word of description, and not of definition; and it would have been only introducing a source of confusion to use the expression 'gross negligence' instead of the equivalent—a want of due care and skill in navigating the vessel—which was again and again used by the Lord Chief Justice in his summing up."

"Gross negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "ordinary negligence;" but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the *employés* of the Company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the Company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury.

For this reason the judgment is reversed, and a new trial ordered.

Cited—18 Kan., 523; 35 Mich., 303; 19 Fla., 127; 43 Am. Rep., 18; 47 Md., 164; 23 Am. Rep., 444; 30 Minn., 463; 42 Am. Rep., 377.

THE WESTERN UNION TELEGRAPH
COMPANY, *Plff. in Err.*,

v.

CHARLES EYSER.

(See S. C., 1 Otto, 495, 496.)

Case affirmed.

1. The decision in *The Milwaukee and St. Paul Railway Co. v. Arms*, ante, 374, controls this case.

2. Compensatory damages can be recovered for an act of negligence, but not exemplary damages, unless the act was willful.

[No. 118.]

Argued Jan. 6, 1876. Decided Jan. 31, 1876.

IN ERROR to the Supreme Court of the Territory of Colorado.

This was an action on the case instituted by Eysler against the Western Union Telegraph Company, in the District Court of Arapahoe Co., Col., to recover damages for injuries sustained by him in consequence of being thrown from his horse at the corner of Blake and F Streets in the City of Denver, by coming in contact with a telegraph wire which was being put up on a pole at the time of the accident, and which was stretched, when the plaintiff's horse came in contact with it, along the outer edge of the sidewalk, a short distance from the ground.

The declaration averred that the injury was caused by the negligence of defendant's servant.

The pleas were: 1. General issue; 2. *Nul tiel corporation*; 3. Contributory negligence of plaintiff; 4. Negligence and primary liability of the City of Denver.

Plaintiff demurred to 2d, 3d and 4th pleas.

The court sustained the demurrer.

The case was tried upon the plea of the general issue. The jury found a verdict for the plaintiff, and assessed his damages at \$5,000.

The Supreme Court of the Territory affirmed the judgment of the district court.

Among other things the court instructed the jury as follows:

"If the defendant's agents and servants, acting within the scope of their authority from the defendant, were engaged in constructing a telegraph line in the City of Denver, and in such construction stretched a wire across one of the public and frequented streets of said city during the hours of the day when such streets are wont to be frequented, and suffered such wires to remain stretched across said street, and elevated such a distance above the ground as to obstruct or entangle the feet of a horse passing upon said street for the space of one half minute to a longer period; and if, unless such wire was of such size and character as to be easily seen by persons approaching at a moderate speed, defendant's agents omitted to station flag sentinels; or, by other sufficient means of warning, to warn or notify passers-by of the place where such wire was stretched; or if defendant's agents did station such sentinels and they failed to give warning to the plaintiff, then the defendant was guilty of negligence, and if from such negligence the injury complained of occurred, without culpable negligence on the part of the plaintiff contributing thereto, then the jury ought to find for the plaintiff, and in fixing the plaintiff's damages, should compensate the plaintiff, not alone for his actual loss, in the loss of time during his

See 1 Otto.

confinement or disability, if any, resulting from the alleged accident, but may award exemplary damages proportioned to the nature and extent or character of the injury, and all circumstances of aggravation or extenuation attending the alleged negligence of defendant, and the extent of such damages is to be measured by the sound discretion of the jury in view of all the circumstances; but such damages are not to exceed the damages laid in the declaration, \$10,000.

Messrs. J. Hubley Ashton and Grosvenor Porter Lowrey, for plaintiff in error.

Mr. J. W. Denver, for defendant in error.

Mr. Justice Davis delivered the opinion of the court:

The decision just rendered in *R. Co. v. Arms* [ante, 374], controls this case. In no view of the evidence was the court justified in instructing the jury that exemplary damages could be recovered. The omission to station flag sentinels or to give some other proper warning, while the men were engaged in putting up the wire, was an act of negligence, entitling the plaintiff to compensatory damages. But there was nothing to authorize the jury to consider this omission as willful. On the contrary, the evidence rebuts every presumption that there was any intentional wrong.

The judgment of the Supreme Court of the Territory is reversed and this cause is remanded to that court, with directions to reverse the judgment of the district court and order a new trial.

FREDERICK J. MAYER AND SETH EVANS,
Assignees, Under the Assignment Laws of the State of Ohio, of GEORGE BOGEN and JACOB BOGEN, as Individuals and as Late Partners as G. & J. BOGEN, and of GEORGE BOGEN, JACOB BOGEN and HENRY MULLER, as Individuals and as Late Partners as GEORGE BOGEN & SON, *Plffs. in Err.*,

v.

MAX HELLMAN, Assignee in Bankruptcy of Same Assignors, Bankrupts.

(See S. C., 1 Otto, 496-503.)

Assignment by insolvent debtor, when not void under Bankrupt Act.

*An assignment by an insolvent debtor of his property to trustees for the equal and common benefit of all his creditors is not fraudulent, and, when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees.

[No. 546.]

Submitted Dec. 16, 1875. Decided Jan. 31, 1876.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This action was commenced in the court below, by the defendant in error against the plaintiffs in error. The plaintiffs in error an-

*Head note by *Mr. Justice FIELD*.

swered, and the defendant in error demurred thereto. The court below sustained the demurrer.

The case is stated by the court.

Messrs. Wm. T. Forrest and Caldwell, Coppock & Caldwell. for plaintiffs in error.

Mr. Adam A. Kramer, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

The plaintiff in the court below is assignee in bankruptcy of Bogen and others, appointed in proceedings instituted against them in the District Court of the United States for the Southern District of Ohio; the defendants are assignees of the same parties, under the assignment laws of the State of Ohio; and the present suit is brought to obtain possession of property which passed to the latter under the assignment to them. The facts as disclosed by the record, so far as they are material for the disposition of the case, are briefly these: on the 3d of December, 1873, at Cincinnati, Ohio, George Bogen and Jacob Bogen, composing the firm of G. & J. Bogen, and the same parties with Henry Muller, composing the firm of Bogen & Son, by deed executed of that date, individually and as partners, assigned certain property held by them, including that in controversy, to three trustees, in trust for the equal and common benefit of all their creditors. The deed was delivered upon its execution, and the property taken possession of by the assignees.

By the laws of Ohio, in force at the time, when an assignment of property is made to trustees for the benefit of creditors, it is the duty of the trustees, within ten days after the delivery of the assignment to them, and before disposing of any of the property, to appear before the probate judge of the county in which the assignors reside, produce the original assignment, or a copy thereof, and file the same in the Probate Court, and enter into an undertaking payable to the State, in such sum and with such sureties as may be approved by the judge, conditioned for the faithful performance of their duties.

In conformity with this law, the trustees, on the 13th of December, 1873, within the prescribed ten days, appeared before the probate judge of the proper county in Ohio, produced the original assignment, and filed the same in the Probate Court. One of the trustees having declined to act, another one was named in his place by the creditors and appointed by the court. Subsequently the three gave an undertaking with sureties approved by the judge, in the sum of \$500,000, for the performance of their duties, and then proceeded with the administration of the trust under the direction of the court.

On the 22d of June of the following year, more than six months after the execution of the assignment, the petition in bankruptcy against the insolvents was filed in the District Court of the United States, initiating the proceedings in which the plaintiff was appointed their assignee in bankruptcy. As such officer, he claims a right to the possession of the property in the hands of the defendants under the assignment to them.

The validity of this claim depends, as a mat-

ter of course, upon the legality of the assignment. Independently of the Bankrupt Act, there could be no serious question raised as to its legality. The power which everyone possesses over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor, of his property, among his creditors, when unable to meet the demands of all in full, would be deemed not only a legal proceeding but one entitled to commendation. Creditors have a right to call for the application of the property of their debtor to the satisfaction of their just demands; but, unless there are special circumstances giving priority of right to the demands of one creditor over another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. And so, whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding. The hinderance and delay to particular creditors, in their efforts to reach before others the property of the debtor, that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction.

The great object of the Bankrupt Act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. For that purpose, it sets aside all transactions had within a prescribed period previous to the petition in bankruptcy, defeating or tending to defeat such distribution. It reaches to proceedings of every form and kind undertaken or executed within that period by which a preference can be secured to one creditor over another, or the purposes of the Act evaded. That period is four months for some transactions, and six months for others. Those periods constitute the limitation within which the transactions will be examined and annulled, if conflicting with the provisions of the Bankrupt Act.

Transactions anterior to these periods are presumed to have been acquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being assailed by subsequent proceedings in bankruptcy. Unless, therefore, a transaction is void against creditors independently of the provisions of the Bankrupt Act, its validity is not open to contestation by the assignee, where it took place at the period prescribed by the statute anterior to the proceedings in bankruptcy. The assignment in this case was not a proceeding, as already said, in hostility to the creditors, but for their benefit. It was not, therefore, void as against them, or even voidable. Executed six months before the petition in bankruptcy was filed, it is, to the assignee in bankruptcy, a closed proceeding.

The counsel of the plaintiffs in error have filed an elaborate argument to show that assignments for the benefit of creditors generally are not opposed to the Bankrupt Act, though made within six months previous to the filing of the peti-

tion. Their argument is, that such an assignment is only a voluntary execution of what the Bankrupt Court would compel; and as it is not a proceeding in itself fraudulent as against creditors, and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute. There is much force in the position of counsel, and it has the support of a decision of the late *Mr. Justice Nelson*, in the Circuit Court of New York, in *Sedgwick v. Place*, 1 Nat. Bk. Reg., 204, and of *Mr. Justice Swayne* in the Circuit Court of Ohio, in *Langley v. Perry*, 2 Nat. Bk. Reg., 180. Certain it is that such an assignment is not absolutely void, and, if voidable, it must be because it may be deemed, perhaps, necessary for the efficiency of the Bankrupt Act that the administration of an insolvent's estate shall be intrusted to the direction of the district court, and not left under the control of the appointee of the insolvent. It is unnecessary, however, to express any decided opinion upon this head; for the decision of the question is not required for the disposition of the case.

In the argument of the plaintiff's counsel, the position is taken that the Bankrupt Act suspends the operation of the Act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that that statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments; it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the Act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the Statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the Bankrupt Law of Congress suspends all proceedings under the Insolvent Law of the State, has no application.

The assignment in this case being in our judgment valid and binding, there was no property in the hands of the plaintiffs in error which the assignee in bankruptcy could claim. The assignment to them divested the insolvents of all proprietary rights they held in the property described in the conveyance. They could not have maintained any action either for the personalty or realty. There did, indeed, remain to them an equitable right to have paid over to them any remainder after the claims of all the creditors were satisfied. If a contingency should ever arise for the assertion of this

right, the assignee in bankruptcy may perhaps have a claim for such remainder, to be applied to the payment of creditors not protected by the assignment, and whose demands have been created subsequent to that instrument. Of this possibility we have no occasion to speak now.

Our conclusion is, that the court below erred in sustaining the demurrer to the defendant's answer; and the judgment of the court must, therefore, be reversed and the cause remanded for further proceedings.

Cited—88 U. S., 510; 108 U. S., 386; 19 Blatchf., 491; 16 Bk. Reg., 191; 17 Bk. Reg., 200-352; 18 Bk. Reg., 61; 43 Conn., 301; 21 Am. Rep., 680, 683.

THE PROPELLER COLORADO, CHARLES ENSIGN ET AL., Claimants and Appts.

v.

THE BARK H. P. BRIDGE, ELON W. HUDSON, Owner.

(See S. C., "The Colorado," 1 Otto, 692-708.)

Sailing rules—rules, when imperative—vessels navigating the lakes—lookouts—insufficient watch—speed of steamer—question of fact.

1. Steamers must keep out of the way of sailing ships when the two are proceeding in such directions as to involve risk of collision, and the sailing ship must keep her course.

2. There is no regulation or usage which requires a sailing vessel "to lie to" or go about in stays, under such circumstances.

3. Where no special circumstances are proved showing that a departure from the rule was necessary, to avoid immediate danger, the obligation on the part of the sailing vessel is imperative to keep her course.

4. The owners of vessels navigating the lakes are under the same obligations to provide for the safety and security of life and property as attaches to those who are engaged in navigating the sea.

5. If lookouts are not properly stationed, and vigilantly employed in the performance of their duty, and if, in consequence of their neglect, the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel and will render her liable, unless the other vessel was guilty of violating the rules of navigation.

6. A watch, consisting of one officer only and one wheelman and one lookout, in a dark night and a dense fog, is not sufficient to afford the security to life and property which the owners of a large steamer are bound to furnish.

7. The speed of the steamer ought not to be so great that she cannot perform the duty imposed upon her, to keep out of the way of the sailing vessel, if the latter has in all respects complied with the rules of navigation.

8. It is a question of fact, in each particular case, whether the speed was excessive or not.

[No. 65.]

Argued Dec. 6, 7, 1875. Decided Jan. 31, 1876.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The case is stated by the court.

Messrs. George B. Hibbard and W. A. Moore, for appellants.

Messrs. Henry B. Brown, J. G. Abbot, Ashley Pond and John S. Newberry, for appellee.

NOTE.—Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 51 U. S. (10 How.), 557.

Mr. Justice Clifford delivered the opinion of the court:

Lights and other signals are required by law, and sailing rules are prescribed, to prevent collisions and to save life and property at sea; and all experience shows that the observance of such regulations and requirements is never more necessary than in a dense fog, whether in the harbor or in the open ocean, if the vessel is in the common pathway of commerce.

Mariners dread a fog much more than high winds or rough seas. Nautical skill, if the ship is seaworthy, will usually enable the navigator to overcome the dangers of the wind and waves; but the darkness of the night, if the fog is dense, brings with it extreme danger, which the navigator knows may defy every precaution within the power of the highest nautical skill.

Signal lights in such an emergency are valuable; but they may not be seen. Bells and fog-horns, if constantly rung or blown, may be more effectual; but they may not be heard. Slow speed is indispensable; but it will not entirely remove the danger; nor will all these precautions, in every case, have that effect. Perfect security, under such circumstances, is impossible.

Danger attends the vessel if she ceases to move, as other vessels astern may come up; and, even if she goes about and takes the back track, she is still in danger from the vessels astern which have not changed their course. Such a change of course is not required by the sailing rules or by the usages of navigation. Instead of that, the best precautions are bright signal lights, very slow speed, just sufficient to subject the vessel to the command of her helm; competent lookouts properly stationed and vigilant in the performance of their duties; constant ringing of the bell or blowing of the fog-horn, as the case may be, and sufficient force at the wheel to effect, if necessary, a prompt change in the course of the vessel. Where all these precautions are faithfully observed, such disasters rarely occur, and the courts hear very little about inevitable accidents.

Injuries were received by the bark, as her owner alleges, on the 11th of May, 1869, in a collision which took place on Lake Huron between the bark and the propeller Colorado, off Saginaw Bay, about half past eleven o'clock at night, whereby the bark was sunk in the lake, and with her cargo, consisting of 45,000 bricks and 85,000 bushels of oats, became a total loss. Compensation is claimed in the libel for the value of the vessel, freight and cargo.

By the record, it appears that the bark, a sail vessel of 425 tons, was bound down the lake on a voyage from Milwaukee to Buffalo; and that the propeller, a large steamer of 1,500 tons, with a small cargo of general merchandise, was bound up the lake on a voyage from Buffalo to Chicago.

Service was made, and the owners of the propeller appeared and filed an answer. Testimony was taken; and, the parties having been fully heard, the district court entered an interlocutory decree in favor of the libellant, and referred the cause to a master to ascertain the amount of the damages. Hearing was had before the master, and he made a report. Exceptions were taken to the report by the respondent, some of which were sustained and others were over-

ruled; and the district court entered a final decree in favor of the libellant for the sum of \$33,675.26, with interest and costs, as set forth in the decree. Immediate appeal was taken by the respondents to the circuit court, where the decree of the district court was in all things affirmed; and the respondents appealed to this court.

Errors of fact are assigned by the owners of the propeller, all of which deny that the propeller was in fault, which is the principal question in the case. Fault is also imputed to the bark; but the evidence to support the accusation is so slight, that it will not demand any extended examination. Sufficient appears to show that the night was dark and that the fog was quite dense at the time of the collision; that the wind at that time was south; that the bark was sailing by the wind, close-hauled, on her starboard tack, heading southeast by east; that she had pursued that course for some time, and continued to pursue it without changing her helm, until the collision was inevitable, when her helm was put to starboard; that she was staunch and strong, and well manned and equipped; that she showed the requisite signal lights; that she had competent lookouts properly stationed on the vessel, and that they were vigilant in the performance of their duty; that she blew her fog-horn as required by law and the custom on the lakes, and that her speed was moderate. Two blasts were given by her fog-horn; which signify in that locality that the approaching vessel is on the starboard tack, close-hauled. Signals of two blasts were given, in order that approaching vessels might be able to determine her course, and that she was on the starboard tack.

Prior to ten o'clock, the bark was making good speed; but, when the fog became dense, the bark commenced to shorten sail; and the evidence shows that all her light sails were taken in half an hour before the collision. Her speed before the light sails were furled did not exceed five or six knots an hour, and subsequently did not exceed four miles, as appears by the weight of the evidence.

Steamers must keep out of the way of sailing ships when the two are proceeding in such directions as to involve risk of collision; and in such a case the rule is that the sailing ship shall keep her course, so that the steamer may not be baffled or misled in the performance of the duty required of her to keep out of the way. Special circumstances may exist in certain cases rendering a departure from that rule necessary in order to avoid immediate, imminent danger; but there is no evidence in this case making it necessary to consider any of the qualifications to the general rule. *The Warrior*, L. R. 3 Adm. & Eccl., 555.

Beyond all doubt, the evidence establishes the proposition that the bark did keep her course, as required by the eighteenth article of the Sailing Rules; and, it appearing that there is no evidence tending to bring the case within any of the qualifications contained in the nineteenth article of the same rules, the *prima facie* presumption is that the propeller was in fault.

Three answers are given to that theory by the owner of the propeller, either of which, if true, is conclusive that the decree below is erroneous: (1) That the bark was in fault. (2) That the pro-

propeller was not in fault. (8) That the collision was the result of inevitable accident.

1. Much discussion of the first proposition is unnecessary, as it has already been shown that the signal lights of the bark were well displayed; that she had competent lookouts properly stationed, and that they were vigilant in the performance of their duty. Due signals from her fog-horn were given as frequently as required by law or the custom of the lakes, and her speed was moderate; her foresail and all her light sails having been furled or taken down at least a half hour before the disaster.

What more the bark ought to have done the owner of the propeller does not state. Doubtless he knows that a sailing vessel cannot absolutely stop without coming to anchor; and there is no regulation or usage which requires a sailing vessel "to lie to" or go about in stays, under such circumstances; nor would it add anything to the safety of life or property at sea if such a precaution was adopted, as the vessel would still be in the pathway of commerce, and be exposed to collision by vessels approaching from any and every direction. All her light sails had been taken in, as matter of precaution, to lessen her speed, and to put the vessel more completely at the command of her helm. Both the master and second mate were on deck; and the wheelman was an able seaman of experience, and the lookout was stationed on the top-gallant forecabin.

When the wind is high, it is frequently necessary to reef some or all of the other sails; but it is not usual to do so in the open sea, when the wind is moderate, or properly described as merely a fresh breeze. Emergencies frequently arise, in rough weather, when good seamanship requires that the sails, part or all, should be furled; and it appears that part of the sails of the bark were furled. Besides, it was the propeller that struck the bark on her starboard side, nearly opposite the mainmast; and the evidence shows that the propeller cut nearly or quite ten feet into the side of the bark, having struck the bark at an angle of about forty-five degrees.

Viewed in the light of all the circumstances, the court is of the opinion that the proposition of the owner of the propeller, that the bark was in fault, is not sustained.

2. Suppose that is so; still it is insisted by the owner of the propeller that his vessel was not in fault; which is a proposition that will deserve more consideration. Attempt is made in argument to establish the proposition that the bark ought to have changed her course, and kept out of the way of the propeller; but it is a sufficient answer to that suggestion, that the evidence does not disclose any special circumstances which would have justified the bark in departing from the rule that, when the steamer is required to keep out of the way, the sailing ship shall keep her course. Due regard, it is true, must be had in such a case to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immediate danger. Concede that; but still it is equally well settled, that where no special circumstances are proved, showing that a departure from the rule is necessary to avoid immediate danger, the obligation on the part of the sailing vessel is imperative to keep her course.

See 1 Otto.

The Sunnyside [ante, 302]; *Crockett v. Newton*, 18 How., 583 [59 U. S., XV., 493]; 1 Pars. Ship. & Ad., 580.

Still it is insisted by the respondent that the propeller was not in fault; and, in order to determine that question satisfactorily, it will be necessary to refer again to the evidence. Nor can the details of the evidence be entirely avoided, as there is some conflict in the testimony of the witnesses.

All agree that the night, subsequent to eleven o'clock, was foggy, and that the wind was south, blowing only a moderate breeze; and the evidence shows that the mate of the propeller had charge of her navigation. His watch consisted of the wheelman, one lookout (stationed forward on the promenade deck), and one engineer, who had charge of the engine; that the propeller was one of the largest on the lake, measuring fourteen hundred and seventy tons; that she was heading north-northwest at the time the fog settled down, and that her speed was between nine and ten miles an hour. It appears from the testimony of the mate that the fog became very dense, and that he spoke to the master, who was in his room lying on a lounge, and that, pursuant to the master's suggestions, he directed the engineer to let the propeller go slow; and he testifies that he took his position in front of the pilot-house, where he continued to sound the whistle, every one or two minutes, up to within a very short time of the collision. He is confirmed by the master as to the directions given to the engineer; and the master admits that he immediately returned to the lounge, where he fell asleep, and that it was the jar of the collision that aroused him from the lounge.

Enough appears to show conclusively that there was but one lookout, and no other seamen to assist the wheelman in any emergency which might arise; though the master, as well as the mate, was fully apprised that the fog was unusually dense, and both knew full well that the course of the propeller was in the much frequented pathway of commerce. Such a watch, consisting only of the mate, one wheelman, and one lookout besides the engineer, could hardly be deemed sufficient for such a large propeller, even in a clear night; and if not, it certainly cannot be regarded as one equal to the emergencies likely to arise in a dark night, when the fog was as dense as it was on the night of the collision.

Ocean steamers, as remarked by this court on a former occasion, usually have, in addition to the officer of the deck, two lookouts, who are generally stationed, one on the port and one on the starboard side of the vessel, as far forward as possible. During the time they are charged with that service, they have no other duties to perform; and no reason is perceived why any less precaution should be taken by first-class steamers on the lakes. Their speed is quite as great, and the navigation is no less exposed to the dangers arising from the prevalence of mist and fog, or from the ordinary darkness of the night; and the owners of vessels navigating there are under the same obligations to provide for the safety and security of life and property as attaches to those who are engaged in navigating the sea. *Chamberlain v. Ward*, 21 How., 571 [62 U. S., XVI., 219].

Required, as steamers are, to keep out of the way of sailing vessels, the propeller is at least bound to show that she took reasonable precaution to meet any emergency which might arise from the darkness of the night, and that she was not guilty of the want of any ordinary care, caution, or of maritime skill. Those in charge of her navigation knew that she was in waters frequented by other vessels, and that many other vessels were in the vicinity at that time, as indicated by the fog-horns heard from almost every direction.

Signal lights were obscured by the density of the fog: but the sound of the fog-horns could be heard, and the evidence shows that the number blown ought to have admonished the master before he went to sleep, as well as the mate, that the surrounding and approaching dangers might make it necessary to effect sudden changes in the course of the propeller.

Sudden dangers of collision might reasonably have been expected from the extreme darkness of the night and the known vicinity of other vessels. Under such circumstances, it is apparent that the watch on deck, considering the size of the propeller and her speed, was not sufficient for the occasion. Support to that view, if more is needed, is found in the fact that, when the emergency came, the mate deemed it necessary, when he gave the second order to the wheelman, to direct the lookout to leave the place where he was stationed, and go to the wheel to help the wheelman to put the same hard a-starboard, leaving the propeller for the time being without any lookout. *The George*, 9 Jur., 670; *The Mellona*, 8 W. Rob., 13.

Lookouts are valueless unless they are properly stationed and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guilty of violating the rules of navigation. *Baker v. The City of N. Y.*, 1 Cliff., 84; *Whitridge v. Dill*, 28 How., 453 [64 U. S., XVI., 583]; *The Catherine v. Dickinson*, 17 How., 177 [58 U. S., XV., 235].

Evidence entirely satisfactory is exhibited in this case, showing that the fog-horn of the bark could be heard for half a mile; and yet it is clear, both from the testimony of the lookout and the mate, that the fog-horn of the bark was not heard until the two vessels were quite near together; and they both testify that they heard only one blast of the horn in the first instance. They agree in respect to the conversation between them when they heard that blast of the horn; and the mate states that he was standing in front of the pilot-house, but the lookout testifies that they were forward on the promenade-deck. Probably the statement of the mate is correct; and he also states that he and the lookout heard the blast of the horn about the same time; that he immediately gave the order to the man at the wheel to port, and went to the top of the pilot-house and gave the signal to stop both engines; that he gave the order to port just as he started, and went to the top of the pilot-house as quick as he could; that he then heard two blasts of the fog-horn from the bark; and that he immediately gave the order to the wheelman to put the wheel hard a-starboard, and or-

dered the lookout "to the wheel to help put it over," and gave the signal for the engines to back.

Steamers of such size, under such circumstances, ought never, in a dark night, to be without a watch on deck sufficiently effective to change the course of the vessel with celerity, without withdrawing the lookout from his station and appropriate duties; nor is it good seamanship for the officer of the deck, if without any assistant in the navigation of the vessel, to station himself in a position where he cannot in such an emergency give immediate signals to the engineer in charge. Even seconds are of great importance when the peril is impending and the danger imminent, as the lives of all on board and property to a large amount may be sacrificed by a moment's delay.

Owners of steamships are bound to afford such reasonable protection to life and property as may be in their power in such emergencies, and moments of extreme peril; and, in the judgment of the court, a watch consisting of one officer only and one wheelman and one lookout, in such a night and under such circumstances, is not sufficient to afford the security to life and property which the owners of such a steamer are bound to afford. Where there is only one officer left on deck, and only one man assigned to duty as a lookout, the watch on deck, including the officer, ought always, in a dark night, to be sufficient to navigate the vessel, even in an emergency, without calling off the lookout to assist at the wheel; as such a steamer in such a night should never, in the judgment of the court, be without at least one lookout to keep watch for approaching vessels.

Forewarned as the master was of the impending danger, he might, if he found it necessary that he should go to the lounge for repose, have increased the watch on deck, or have ordered the second mate or another seaman to the temporary assistance of the lookout, especially as the lookout had been on duty four or five hours when the mate informed the master of the density of the fog. All the master did was to direct the mate to tell the engineer to "let her go slow," and then he went to sleep. Doubtless the order was given to the engineer, and it appears that he slackened the speed of the steamer. Before that, her speed had been between nine and ten miles an hour. Considerable change, undoubtedly, was made under the order communicated to the engineer by the mate. The engineer testifies that her speed after that did not exceed four miles an hour; but other witnesses, entitled to credit, testify that the steamer still made five or six miles an hour. Judging from the effect of the blow when the propeller struck the bark on her starboard side, it is scarcely possible to believe that the estimate of the engineer is correct.

Steamships have great power and in many instances are capable of great speed and, consequently, are always required to observe a great degree of caution, particularly in a dark night. When the night is dark, they are required to be watchful, both as to their speed and course. In regard to the former, it is a question of fact, in each particular case, whether the speed was excessive or not; and, in determining that question, the locality, the hour, the state of the weather and all the circumstances of the occa-

sion are to be fully considered. *The Europa*, 2 Eng. L. & E., 564; 1 Pars. Ship. & Ad., 575; *Newton v. Stebbins*, 10 How., 606; *The Rose*, 2 W. Rob., 3; *Rogers v. The Charles*, 19 How., 111 [60 U. S., XV., 564].

Vessels propelled by steam, if navigating in thoroughfares of commerce, are always required whenever the darkness is such that it is impossible or difficult to see approaching vessels, to slacken their speed, or even to stop and back, according to circumstances; and this court intimated that the principle of that requirement might be applied in a qualified sense to sailing vessels, in crowded thoroughfares, when the darkness was so intense that vessels ahead could not be seen, if it appeared that the sailing vessel was proceeding with a strong breeze under a full press of canvas and with all her studding sails set. *The Morning Light*, 2 Wall., 558 [69 U. S., XVII., 864].

Subject to the qualifications there stated, no doubt is entertained that those suggestions are correct; but they are not applicable to the case before the court, for two reasons: (1) Because the general rule is, that sailing vessels may proceed on their voyage in the open sea, although it is dark, observing all the rules of navigation, with such additional care and precaution as experienced and prudent navigators usually employ under similar circumstances. (2) Because the bark did shorten sail and adopt every necessary precaution. Sailing ships should never, in a dark, foggy night, hazard an extraordinary press of sail; and, in case of unusual darkness, it may be reasonable to require them, when navigating in a narrow pathway, where they are liable to meet other vessels, to shorten sail, if wind and weather will permit. *The Morning Light*, *supra*.

Requirements of the kind are intended as precautions; but the more important rule is, that steamships shall keep out of way of sailing vessels; and the 16th article of the Sailing Rules provides, that when steamships are approaching another ship, so as to involve risk of collision, they shall slacken their speed, or, if necessary, stop and reverse; and the express provision is that every steamship shall, when in a fog, go at a moderate speed.

Great difficulty would attend any effort to define, with mathematical precision, what is a moderate speed in any particular case, further than to say that the speed ought not to be so great that the steamer cannot perform the duty imposed upon her by the Act of Congress—"to keep out of the way of the sailing vessel," if the latter has in all respects complied with the rules of navigation. Different formulas have been suggested by different judges, as criterions for determining whether the speed of a steamer in any given case was or was not greater than was consistent with the duty which the steamer owed to other vessels navigating the same waters; but, perhaps, none yet suggested is more useful or better suited to enable the inquirer to reach a correct conclusion, than the one adopted by the Privy Council. *The Batavier*, 40 Eng. L. & E., 25.

In that case the court say: "At whatever rate she (the steamer) was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate." *Ap- See 1 Otto*.

ply even a less strict rule to the case before the court, and it is clear that the propeller, in view of the insufficiency of the watch on deck for such a steamer in such a night, and the extreme darkness, was guilty of negligence in not slackening down her speed to a slower rate.

Beyond all question, it was her duty to have seen and heard the bark in season to have complied with the requirement to keep out of the way of the bark; and it appears that she might have done so, if those responsible for the navigation of the propeller had not been guilty of negligence. Two blasts of the fog-horn were blown by the bark; but the mate and lookout did not, in the first instance, hear but one, when the mate gave the order to port, which proved to be a wrong order. Presently both the mate and the lookout heard two blasts; and then the mate gave the order, "Hard a-starboard!" and sent the lookout to assist in carrying the order into effect; but the collision occurred before the last order had much effect.

Examined in the light of these facts, which are fully proved, it is obvious that neither of the orders was given in season to be of any substantial avail, and that the propeller is responsible for the disaster.

3. Other defenses failing, it is next insisted by the owner of the propeller that the collision was the result of inevitable accident; but, having decided that the propeller was in fault, the discussion of that proposition is unnecessary, as such a defense can never be maintained, unless it appears that both parties were without fault.

Exceptions were taken in the district court to the report of the master; and it is insisted, in behalf of the propeller, that error was committed in confirming that report. Some of the exceptions were sustained and others overruled; and, in the judgment of the court, the report, as confirmed, is correct.

Decree affirmed.

Cited—6 Sawy., 122.

ELIZA W. WARFIELD, *Plff. in Err.*,

v.

JOHN CHAFFE AND CHARLES CHAFFE

(See S. C., 1 Otto, 690-692.)

Petition, when no part of record—jurisdiction over state judgment.

The petition for the allowance of writ of error in this court is not part of the record of the State Court below. This court acts only upon that record, and where that does not show that any federal question was either presented by the pleadings or upon the trial in the State Court, this court has no jurisdiction.

[No. 851.]

Submitted Jan. 24, 1876. Decided Feb. 4, 1876.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Messrs. Durant & Hornor, for defendant in error.

Mr. W. J. Q. Baker, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This action was commenced in the Fourteenth

District Court in and for the Parish of Ouachita, Louisiana, to recover the amount due upon a note made by Mrs. Warfield, the plaintiff in error, to W. J. Q. Baker, and by him indorsed to the plaintiffs below, John Chaffe & Brother; and also to enforce a vendor's privilege. Judgment was asked for the amount claimed to be due upon the note, and also for "\$15 costs of stamping." Attached to the petition was a copy of the note, bearing date May 3, 1867; below which was the following: "Original act duly stamped and canceled by collector of Third District of Louisiana, this third day of September, 1872 — F. A. Hall, D'y Recorder."

Mrs. Warfield answered the petition; and, among other defenses, she insisted that there were not any revenue stamps on the note when it went into the hands of the plaintiffs, and that they had no authority to put stamps upon it. She thus, by the pleadings, tendered an issue of fact.

The principal contest between the parties was as to the plaintiffs' title to the note; and W. J. Q. Baker was permitted to intervene in his own behalf, and to insist that he was the owner.

At the trial in the district court, no question as to the stamping of the note appears to have been presented or decided; certainly no testimony was offered on either side in respect to it. All the testimony in the case appears to be incorporated in the record. Judgment having been given against Mrs. Warfield and Baker in the district court, they each appealed to the Supreme Court, where the judgment was affirmed in July, 1874. In the opinion of the court, which comes here as part of the record, the only reference to the question of stamps which appears is as follows: "The objection that the note was not stamped, not having been made when it was received in evidence, cannot now be considered."

In the petition presented to the *Chief Justice* of the Supreme Court of the State for the allowance of this writ, it is stated, for the first time in the case, that the defendant, Mrs. Warfield, claimed the privilege, right and immunity of being relieved and exempted from all liability on the note or obligation sued on, under the laws of the United States requiring such instruments to be stamped to give them validity at the time the instrument sued upon was executed; and the decision of the Supreme Court of the State denied the claim.

The record sent here from the Supreme Court does not disclose any such claim. The petition for the allowance of the writ in this court is not part of the record of the court below. We act only upon that record; and that does not show that any federal question was either presented by the pleadings or upon the trial in the District Court, or decided by the Supreme Court.

The motion to dismiss for want of jurisdiction must be granted.

DANIEL WEBSTER, *Plff. in Err.*,
v.
CLARK W. UPTON, Assignee in Bankruptcy
of THE GREAT WESTERN INSURANCE COM-
PANY.

(See S. C., 1 Otto, 65-72.)

Transferee of stock, liable for calls—liabilities of stockholders—transfer on books.

1. The transferee of stock in an incorporated company is liable for calls of the unpaid portion of his stock, made after he has been accepted by the company as a stockholder and after his name has been registered on the stock books as a proprietor.

2. The liabilities of the stockholders cannot be discharged by the company to the injury of creditors, without payment.

3. It is the vendor's duty to make the transfer to the purchaser of stock on the books of the company.

[No. 440.]

Submitted Dec. 13, 1875. Decided Feb. 7, 1876

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of *assumpsit* brought in the court below by Clark W. Upton, as assignee in bankruptcy of the Great Western Insurance Company, against Daniel Webster, an assignee of stock bought by him of — Hale, a subscriber for stock in this Company for the unpaid balance on said stock.

The court below charged the jury as follows:

No question is made of the irregularity of the organization of the Great Western Insurance Company. The only question is: was the defendant a stockholder of the Company? If the testimony satisfies you that the defendant purchased of the witness, Hale, one hundred shares of this stock, and that it was transferred on the books of the Company either by Webster, the defendant, or by Hale, who sold the stock, or by the direction of either of them, then the defendant is liable, the same as if he had subscribed for the stock. Now, Webster swears that he received a certificate from Hale or his broker in blank; that he put it in his safe, where it remained until the great fire of 1871; that he never had it transferred on the Company's books. On the other hand, you have the testimony of several witnesses, that they saw the name of Daniel Webster on the stock book. Now, gentlemen, who put it there? It must have been put there by some one who knew the fact of such stock being owned by Webster; and then you will recollect that Loomis, the broker, who sold the stock for Hale to Webster, testified that he heard Webster say that he had it transferred, as he wanted it in his own name. It is true that Webster testified that he did not have it transferred on the books; but it is proper that I should remind you that Webster is the defendant, and is an interested witness, while the other witnesses are disinterested. You may believe Webster, however. Unless the stock was transferred on the Company's books by either Webster or Hale, or by their direction, or the direction of one of them, the plaintiff cannot recover; because he did not become a stockholder, he could not receive dividends, and there was no privity between him and the Company. If you find for the plaintiff, you will assess the damages at eighty per cent. on the one hundred shares, with interest; if you find for the defendant, you will simply say so.

The defendant objected to the giving of such instructions, which objection was overruled by said court; to which defendant excepted.

The jury rendered a verdict for the plaintiff. Defendant moved for a new trial, which motion was overruled. Thereupon the court rendered judgment for the plaintiff.

The certificate which was issued by the Company to ——— Hale, and by him transferred to the plaintiff, is in the following words:

THE GREAT WESTERN INSURANCE COMPANY.
(Number.) (Shares.)

Capital Stock, \$500,000, with liberty to increase to \$5,000,000.

Organized July 20, 1857, under Act of Legislature approved Mch. 4, 1857.

THIS IS TO CERTIFY THAT ——— is entitled to ——— shares in the capital stock of the Great Western Insurance Co. of Chicago, Ills., of one hundred dollars each, of which twenty per cent. is payable as follows: Five per cent. on receipt of stock certificate. Five per cent. in three months from the date hereof. Five per cent. in nine months from date, transferable only in the books of the Company in person or by attorney, on the surrender of this certificate, being subject to the charter and by-laws of said Corporation and laws of the State of Illinois.

Dated at Chicago this ——— day of [STAMPS.] ———, in the year of our Lord one thousand eight hundred and ———.

————, Secretary.

Messrs. E. Van Buren and H. S. Monroe, for plaintiffs in error:

We claim that an assignee of stock is not liable for future assessments in an action against him by the Company, or its assignee in bankruptcy, merely on the ground of his being such assignee of the stock.

This action is based upon a promise express or implied.

Even a subscriber for stock is not liable for future assessments or calls, unless there has been a promise to pay, or unless there is a provision in the charter or some public statute making him liable.

Plank-Road Co. v. Payne, 17 Barb., 567; *R. R. Co. v. Kendall*, 81 Me., 470; *Seymour v. Sturges*, 26 N. Y., 184; *Palmer v. Mining Co.*, 34 Pa., 288.

The plaintiff in error in this case, who is a naked assignee of stock is not liable, even if the subscriber is.

If the subscriber was liable to the Company, his assignment of his stock to the plaintiff in error does not release him.

Plank Road Co. v. Thatcher, 11 N. Y., 108.

Upon what principle can it be claimed that the plaintiff in error is liable? It is not claimed that he made any promise or engagement of any kind to anyone; he merely took the certificate for what it was worth. He might pay future calls or forfeit his stock, as he should choose. The charter did not make him liable. The certificate did not make him liable. There was no agreement of any kind to create any personal liability. He did not intend to incur any personal liability, and he did not suppose he was making himself liable, and the Company did not intend that any holder of a certificate should be liable. Assuming that he had his name put on the stock book, we cannot concede how that created any liability. No court has ever gone so far as to say that a mere stockholder was liable for assessments; much less an assignee of stock.

Palmer v. Mining Co. (supra); *Del. & S. Sea 1 Otto*.

Can. Co. v. Sansom, 1 Binn., 70; *Seymour v. Sturges*, 26 N. Y., 184.

It may be claimed by the defendant in error that the plaintiff in error took the stock *cum onere* and is, therefore, liable.

We understand *cum onere* to mean a lien upon the property, as a pledge or, being by attachment a legal lien, something that can take the property. Bouvier defines it to be with the burden; subject to the incumbrance; subject to the charge; a purchase with knowledge of the incumbrance takes the property *cum onere*.

Now, in this case there was no lien or incumbrance on the stock; no assessment had been made, no burden was upon it; it was bought by plaintiff in error as full paid up stock, non-assessable; even if there had been an incumbrance upon it, unless the plaintiff had purchased with knowledge of the incumbrance, actual or constructive, he would, as an innocent purchaser, hold the property as against the incumbrance; and if he had purchased subject to an incumbrance, he would not be personally liable to pay the incumbrance unless he agreed to pay it. In the case of *Seymour v. Sturges*, 26 N. Y., 141, the court held that in a case like the one now before the court, *cum onere* did not apply.

Mr. L. H. Boutell, for defendant in error:

An assignee of stock is liable for unpaid balances thereon to the same extent as the original holder.

1. This court having decided, in the case of *Carver v. Upton (ante, 224)*, that the original holders of the stock are liable for the unpaid balances thereon, the question arises as to the liability of the assignees of the stock. That an assignee of stock is subrogated to the liabilities as well as the rights of the original holder thereof, is settled beyond controversy.

R. R. Co. v. Boormun, 12 Conn., 530; *Ang. & Ames, Corp.*, sec. 534; 1 Redf. Railw., sec. 42, n. 3.

2. As between the buyer and seller, the transaction is completed by an assignment of the certificate of stock. To establish a privity between the buyer and the Company, there must be a transfer on the books of the Company. But when this transfer is made on the books of the Company, the change of ownership is complete for all purposes; and the transferee becomes clothed with the rights and liabilities of the original holder, even although a new certificate may not be issued to the transferee.

1 Redf. Railw., sec. 32, sec. 3, n. 2; *Cheltenham Railway Co. v. Daniel*, 2 A. & E. (N. S.), 281.

3. Transfers of stock may be in blank.

1 Redf. Railw., sec. 35, n. 2; *Ang. & Ames, Corp.*, sec. 564, n. 2 (a); *Stone v. Hackett*, 12 Gray, 227; *Kortright v. Bk.*, 20 Wend., 91; *White v. R. R. Co.*, 21 How., 575 (62 U. S., XVI., 221); *Sheffield R. R. Co. v. Woodcock*, 7 M. & W., 574.

Mr. Justice Strong delivered the opinion of the court.

The Great Western Insurance Company, of which the plaintiff below is the assignee in bankruptcy, was incorporated under the laws of Illinois in 1857, with general power to insure all kinds of property against both fire and marine losses. Subsequently to its organization, its capital was increased to more than \$1,000,-

000, and it was authorized by law further to increase its capital to \$5,000,000. It does not appear, however, from the record, that, of the stock subscribed, more than about \$222,000 was ever paid in—a sum equal to nearly twenty per cent. of the par value—leaving over \$965,000 of subscribed capital unpaid. In this condition the Company went into bankruptcy in 1872, owing a very large sum, equal to if not greater than its entire subscribed capital; and Clark W. Upton, the plaintiff, became the assignee. The district court then directed a call to be made for the eighty per cent. remaining unpaid, of the capital stock. A call was accordingly made; and, payments having been neglected, the assignee brought this suit against the defendant, averring that he was the holder of one hundred shares, of the par value of \$100 each and, as such, responsible for the eighty per cent. unpaid. On the trial, evidence was given tending to show that one Hale was the owner of a large amount of the stock of the Company, for which he held the Company's certificates; and that he had, through his brother, sold one hundred shares to the defendant, on which twenty per cent. had been paid. The books of the Company had been destroyed in the great fire in Chicago in 1871; but there was evidence tending to show that the defendant's name was on the stock ledger, and that the defendant transferred, or caused the stock bought from Hale to be transferred to himself on the books of the Company. The district judge submitted to the jury to find whether the defendant actually thus became a stockholder, recognized as such on the books of the Company; instructing them that, if he did, he was liable for the eighty per cent. unpaid as if he had been an original subscriber. A verdict and judgment having been recovered by the plaintiff, the case was removed by writ of error to the circuit court, where the judgment was affirmed; and the judgment of affirmance we are now called upon to review.

The leading assignment of error here is, that the court below erroneously ruled that an assignee of stock, or of a certificate of stock, in an insurance company, is liable for future calls or assessments without an agreement or promise to pay. This, however, is not a fair statement of what the court did rule. The court instructed the jury, in effect, that the transferee of stock on the books of an insurance company, on which only twenty per cent. of its nominal value has been paid, is liable for calls for the unpaid portion made during his ownership, without proof of any express promise by him to pay such calls. This instruction, we think, was entirely correct. The capital stock of an insurance company, like that of any other business corporation, is a trust fund for the protection of its creditors or those who deal with it. Neither the stockholders nor their agents, the directors, can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company. And the stock thus held in trust is the whole stock, not merely that percentage of it which has been called in and paid. This has been decided so often, that it has become a familiar doctrine. But what is it worth if there is no legal liability resting on the stockholders to pay the unpaid portion of their shares, unless they have expressly promised to pay it? Stockholders become such in several ways:

either by original subscription, or by assignment of prior holders, or by direct purchase from the company. An express promise is almost unknown, except in the case of an original subscription; and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it. Practically, then, unless the ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership, the fund held in trust for creditors is only that portion of each share which was paid prior to the organization of the company—in many cases, not more than five per cent.; in the present, only twenty. Then the company commences business and incurs obligations, representing all the while, to those who deal with it, that its capital is the amount of stock taken, when in truth the fund which is held in trust for creditors is only that part of the stock which has been actually paid in. This cannot be. If it is, very many corporations make fraudulent representations daily to those who give them credit. The Great Western Insurance Company reported to the auditor of public accounts, as required by law, that the amount of its capital stock outstanding (par value of shares \$100 each) was \$1,188,000; that the amount of paid up capital stock was \$222,831.42, and that the amount of subscribed capital for which the subscribers or holders were liable was \$965,168.58. This report was made on the 10th of January, 1871. Thus those who effected insurances with the Company were assured that over \$1,000,000 were held as a trust fund to secure the Company's payment of their policies. But, if the subscribers and holders of the shares are not liable for the more than eighty per cent. unpaid, the representation was untrue. Persons assured have less than one fifth the security that was promised them. This is not what the statutes authorizing the incorporation of the Company contemplated. The stock was required to be not less than a given amount, though the Company was authorized to commence business when five per cent. of that amount was paid in. Why fix a minimum amount of stock, if all of it was not intended to be a security for those who obtained insurance? There is no conceivable reason for such a requirement, unless it be either to provide for the creditors a capital sufficient for their security, or to secure the stockholders themselves against the consequences of an inadequate capital. The plain object of the statute, therefore, would be defeated if there is no liability of the stockholder to pay the full prescribed amount of each share of his stock. With this plain object of the Legislature in view, it must be assumed, after the verdict of the jury, that the defendant voluntarily became a stockholder. Either he must have designed to defeat the legislative intent, or he must have consented to carry it out. The former is not to be presumed; and if the latter was the fact, coming as he did into privity with the Company, there is a necessary implication that he undertook to complete the payment of all that was unpaid of the shares he held whenever it should be demanded. To constitute a promise binding in law, no form of words is necessary. An implied promise is proved by circumstantial evidence; by proof of circumstances that show the party intended to assume an ob-

ligation. A party may assume an obligation by putting himself into a position which requires the performance of duties.

What we have said thus far is applicable to the case of an original subscriber to the stock, and equally to a transferee of the stock who has become such by transfer on the books of the company. There are, it is true, decisions of highly respectable courts to be found, in which it was held that even a subscriber to the capital stock of an incorporated company is not personally liable for calls, unless he has expressly promised to pay them, or unless the Act of incorporation or some statute declares that he shall pay them. Such was the decision of a Supreme Court of New York, in *Plank-Road Co. v. Payne*, 17 Barb., 567. A similar ruling was made in *R. R. Co. v. Kendall*, 31 Me., 470. A like ruling has also been made in Massachusetts. In most if not all of these cases, it appeared that the law authorizing the incorporation of the companies had provided a remedy for non-payment of calls or assessments of the unpaid portions of the stock taken. The Company was authorized to declare forfeited or to sell the stock for default of the stockholder; and, the law having given such a remedy, it was held to be exclusive of any other. Yet in them all it was conceded that, if the statute had declared the calls or assessments should be paid, an action of *assumpsit* might be maintained against the original stockholder on a promise to pay, implied only from the legislative intent. Surely the legislative intent that the full value of the stock authorized and required to be subscribed—in other words, the entire capital, shall be, in fact, paid in when required—that it shall be real, and not merely nominal—is plain enough when the authority to exist as a corporation and to do business is given on condition that the capital subscribed shall not be less than a specified sum. A requisition that the subscribed stock shall not be less than \$1,000, (and) would be idle if the subscribers need pay only a first installment on their subscriptions; for example, five per cent. Manifestly, that would not be what the law intended; and if its intent was that the whole capital might be called in, it is difficult to see why a subscriber, knowing that intent, and voluntarily becoming a subscriber, does not impliedly engage to pay in full for his shares when payment is required. It is, however, unnecessary to discuss this question further; for it is settled by the judgment of this court. In *Upton v. Tribilcock* [*ante*, 203], decided at this Term, we ruled that the original holders of the stock are liable for the unpaid balances at the suit of the assignee in bankruptcy, and that without any express promise to pay. The bankrupt corporation in that case was the same as in this.

But, if the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock, when he has come into privity with the Company by having stock transferred to him on the Company's books, is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor. And such is the law as laid down by the text writers generally, and by many decisions of the courts. *Bond v. Susquehanna Bridge*, 6 Harr. & J., 128; *Hall v. Ins.* See 1 OTTO.

Co., 5 Gill, 484; *R. R. Co. v. Boorman*, 12 Conn., 530; *Canal Co. v. Buckley*, 7 T. R., 86. There are a very few cases, it must be admitted, in which it has been held that the purchaser of stock, partially paid, is not liable for calls made after his purchase. Those to which we have been referred are *Canal Co. v. Sansom*, 1 Binn., 70, where the question seems hardly to have been considered, the claim upon the transferee having been abandoned; and *Palmer v. Mining Co.*, 34 Pa. St., 288, which is rested upon *Sansom's* case and upon the fact that, by the charter, the Company was authorized to forfeit the stock for non-payment of calls. We are also referred to *Seymour v. Sturgess*, 26 N. Y., 134, the circumstances of which were very peculiar. In neither of these cases was it brought to the attention of the court that the stock was a trust fund held for the protection of creditors in the first instance, a fund no part of which either the Company or its stockholders was at liberty to withhold. They do not, we think, assert the doctrine which is generally accepted. In *Angell & A., Corp.*, sec. 534, it is said:

"When an original subscriber to the stock of an incorporated company, who is so bound to pay the installments on his subscription from time to time as they are called in by the company, transfers his stock to another person, such other person is substituted not only to the rights, but to the obligations of the original subscriber, and he is bound to pay up the installments called for after the transfer to him. The liability to pay the installments is shifted from the outgoing to the incoming shareholder. A privity is created between the two by the assignment of the one and the acceptance of the other, and also between them and the corporation; for it would be absurd to say, upon general reasoning, that, if the original subscribers have the power of assigning their shares, they should, after disposing of them, be liable to the burdens which are thrown upon the owners of the stock."

So, in *Redfield on Railways*, 53, it is said the cases agree that whenever the name of the vendee of shares is transferred to the register of shareholders, the vendor is exonerated, and the vendee becomes liable for calls. We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder, and his name has been registered on the stock books as a corporator; and, being thus liable, there is an implied promise that he will pay calls made while he continues the owner.

All the cases agree that creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company. This results from the fact that the whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent. From this it is a legitimate deduction that the stock cannot be released; that is, that the liabilities of the stockholders cannot be discharged by the company to the injury of creditors without payment. The fact, therefore, that in this case the certificate of stock taken by the defendant below was marked "non-assessable," is of no importance. The suit is brought by the assignee in bankruptcy, who represents cred-

itors; and, as against him, the Company had no right to release the holders of the stock from the payment of the eighty per cent. unpaid.

The second assignment of error and the third are, in substance, that the court should not have admitted in evidence the order of the district court, directing a call by the assignee of the unpaid balance of the stock, and should not have ruled that the call made under the order was effective to make the liability of the defendant complete. That these assignments cannot be sustained was decided in *Sanger v. Up-ton* [ante, 220], a case before us at this Term. Nothing more need be said in reference to them.

The last assignment of anything that can be assigned for error is, that the court charged the jury as follows: "The only question is, was the defendant a stockholder of the Company? If the testimony satisfies you that the defendant purchased of — Hale one hundred shares of this stock, and that it was transferred in the books of the Company, either by Webster, the defendant, or by Hale, who sold the stock, or by the direction of either of them, then the defendant is liable the same as if he had subscribed for the stock." The objection urged against this is that a transfer on the books directed by Hale, after the purchase by Webster, could not affect the latter's liability. But, if Webster became the purchaser, it was his vendor's duty to make the transfer to him, where only a legal transfer could be made, namely: on the books of the Company; and the purchase was in itself authority to the vendor to make the transfer. Still further, it was Webster's duty to have the legal transfer made to relieve the vendor from liability to future calls. A court of equity will compel a transferee of stock to record the transfer, and to pay all calls after the transfer.

Wynne v. Price, 3 De G. & Sm., 810. If so, it is clear that the vendor may himself request the transfer to be made; and that, when it is made at his request, the buyer becomes responsible for subsequent calls. This, however, does not interfere with the right of one who appears to be a stockholder on the books of a company, to show that his name appears on the books without right and without his authority.

The judgment of the Circuit Court is affirmed.

Cited—95 U. S., 667; 96 U. S., 330; 102 U. S., 316; 103 U. S., 509, 804; 18 Bk. Reg., 468; 16 Bk. Reg., 539; 17 Bk. Reg., 490; 17 Blatchf., 260, 262; 4 Cliff., 549; 5 Dill., 76, 79, 374; 1 Hughes, 161, 162; 87 N. Y., 299; 88 N. Y., 417; 33 Ohio St., 113.

THOMAS A. OSBORN ET AL., *Plffs. in Err.*, v. UNITED STATES.

(See S. C., 1 Otto, 474-479.)

What pardon by President restores—condition annexed—to protect purchaser—proceeds of confiscated property—rights of pardoned person.

*1. A pardon by the President restores to its recipient all rights of property lost by the offense pardoned, unless the property has by judicial process become vested in other persons subject to exceptions prescribed by the pardon itself.

*Head notes by Mr. Justice FIELD.

NOTE.—Conditional pardons. See note to *Ex parte Wells*, 59 U. S., XV., 421.

Effect of pardons. See note to *Armstrong's Foundry v. U. S.*, 73 U. S., XVIII., 882.

2. A condition annexed to a pardon, that the recipient shall not by virtue of it claim any property or the proceeds of any property, sold by the order, judgment or decree of the court, under the confiscation laws of the United States, does not preclude him from applying to the court for the proceeds of a money bond secured by mortgage confiscated, the proceeds being collected by the officers of the court in part by voluntary payment by the obligors, and in part by sale of the land mortgaged. The condition is only intended to protect purchasers at judicial sale, decreed under the confiscation laws, from any claim of the original owner for the property sold or the purchase money.

3. The proceeds of property confiscated, paid into court, are under the control of the court until an order for their distribution is made, or they are paid into the hands of the informer entitled to them, or into the Treasury of the United States.

4. Where moneys belonging to the registry of the court are withdrawn from it without authority of law, the court can, by summary proceedings, compel their restitution; and anyone entitled to the moneys may apply to the court by petition for a delivery of them to him.

[No. 77.]

Submitted Dec. 13, 1875. Decided Feb. 7, 1876.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

This action was commenced by petition filed in the United States District Court of Kansas.

The plaintiffs in error are, or were, the officers of the district court, McDowell having been marshal when the confiscation suits were commenced. He was succeeded by Osborn. Emery was District Attorney.

The facts of the case are sufficiently stated in the opinion.

Messrs. R. M. Corwine, J. W. English, Quinton Corwine, Henry Beard and Charles H. Armes, for plaintiffs in error.

Mr. Edward S. Brown, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

The material questions presented in this case for our determination relate, first, to the effect of the President's pardon upon the rights of the petitioner to the proceeds of his property confiscated by the decrees of the district court; and, second, to the power of the court to compel restitution to its registry of moneys illegally received by its former officers.

In May, 1863, the District Court of Kansas decreed the condemnation and forfeiture to the United States of the several bonds and mortgages described in the information filed by the Government. In June following, it ordered that the several debtors on these bonds should, within five months thereafter, pay into court the money due by them respectively; and that, in default of such payment, the clerk should issue to the marshal orders for the sale of the mortgaged property, upon which he should proceed as on execution under the laws of Kansas. Some of the debtors paid the amounts due by them into court; but the majority of them failed in this respect, and orders for the sale of the property mortgaged were issued to the marshal. To him the greater number paid without sale; but, in some instances, sales were made. Over \$20,000 in this way came into the possession of officers of the court.

There were at the time numerous other confiscation cases pending in the court, and the moneys received from them were indiscriminately mixed with the moneys received in the cases

against the property of the petitioner. None of the moneys received in any of the cases was paid into the Treasury of the United States, and no order was made by the court for any such payment. Some of them were deposited in a banking house at Leavenworth, designated as the place of deposit of moneys paid into court, and afterwards drawn out; some were obtained by officers of the court, and to an extent greatly in excess of their legal charges; and some of them were paid to the judge. The moneys from the different confiscation cases, being indiscriminately mixed, would seem to have been taken by the officers of the court whenever funds were needed by them, without regard to the sources from which they were derived, or the propriety of their application to the purposes for which they were used.

In April, 1866, the petitioner applied to the court for leave to file a petition for the restoration to him of the proceeds of his property, after deducting the costs of the legal proceedings, alleging that he had been pardoned by the President of the United States, and setting forth a copy of the pardon. The pardon was issued in September, 1865, and was, in terms, a full pardon and amnesty for all offenses committed by the petitioner, arising from participation, direct or indirect, in the rebellion, subject to certain conditions. One of these conditions provided that the petitioner should pay all costs which may have accrued in proceedings instituted or pending against his person or property before the acceptance of the pardon. Another condition was, that the petitioner should not, by virtue of the pardon, claim any property or the proceeds of any property which had been sold by the order, judgment or decree of a court under the confiscation laws of the United States.

The district court refused the application; but the circuit court, on appeal, reversed its order and allowed the petition to be filed. The district court held, it would seem, that the conditions attached to the pardon precluded the petitioner from seeking to obtain the proceeds of his property; but the circuit court was of opinion that the effect of a pardon was to restore to its recipient all rights of property lost by the offense pardoned, unless the property had, by judicial process, become vested in other persons, subject to such exceptions as were prescribed by the pardon itself; that, until an order of distribution of the proceeds was made in these cases, or the proceeds were actually paid into the hands of the party entitled, as informer, to receive them, or into the Treasury of the United States, they were within the control of the court, and that no vested right to the proceeds had accrued so as to prevent the pardon from restoring them to the petitioner. Woolworth, 198. This ruling is here assailed by officers of the court, who are called upon to make restitution of a portion of the proceeds they obtained; not by the United States, who are alone interested in the decision. It is not a matter for these officers to complain that proceeds of property adjudged forfeited to the United States are held subject to the further disposition of the court, and possible restitution to the original owner. That is a matter which concerns only the United States, and they have not seen fit to object to the decision. But, independently of this consideration, we are clear

See 1 Otto.

U. S., Book 23.

that the decision was correct. The pardon, as is seen, embraces all offenses arising from participation of the petitioner, direct or indirect, in the rebellion. It covers, therefore, the offenses for which the forfeiture of his property was decreed. The Confiscation Law of 1862, though construed to apply only to public enemies, is limited to such of them as were engaged in and gave aid and comfort to the rebellion. 12 Stat. at L., sec. 7. p. 590. The pardon of that offense necessarily carried with it the release of the penalty attached to its commission, so far as such release was in the power of the Government, unless specially restrained by exceptions embraced in the instrument itself. It is of the very essence of a pardon, that it releases the offender from the consequences of his offense. If, in the proceedings to establish his culpability and enforce the penalty, and before the grant of the pardon, the rights of others than the Government have vested, those rights cannot be impaired by the pardon. The Government having parted with its power over such rights, they necessarily remain as they existed previously to the grant of the pardon. The Government can only release what it holds. But, unless rights of others in the property condemned have accrued, the penalty of forfeiture, annexed to the commission of the offense, must fall with the pardon of the offense itself, provided the full operation of the pardon be not restrained by the conditions upon which it is granted. The condition annexed to the pardon of the petitioner does not defeat such operation in the present case. The property of the petitioner forfeited consisted of numerous money bonds, secured by mortgage on lands in Kansas. These bonds were not sold under the confiscation laws; they were collected by the officers of the court, in part by voluntary payments by the obligors, and in part by sale of the lands mortgaged. These lands did not belong to the petitioner. A mortgage in Kansas does not pass the title of the property mortgaged; it is a mere security for the debt, to which the creditor may resort to enforce payment. The property mortgaged was not confiscated nor sold under the confiscation laws. When a bond of one of the debtors was not voluntarily paid, the court proceeded to enforce its payment by the ordinary measure resorted to in the case of mortgages; that is, a sale of the security.

The object of the condition in question annexed to the pardon was, to protect the purchaser of property of the petitioner, at a judicial sale decreed under the confiscation laws, from any claim by him either for the property or the purchase money. Numerous sales had been made under decrees in confiscation cases, and a similar condition was usually inserted in pardons to secure the purchasers from molestation. Full effect is thus given to the condition; and, as a pardon is an act of grace, limitations upon its operation should be strictly construed.

But it is contended that, as the bonds were forfeited to the Government by the decree of the district court, there can be no restitution except by grant or conveyance of some kind from the Government, and that the proprietary interests of the Government can only be disposed of by Act of Congress. The answer is, that the forfeiture results, not from the decree of the court, but from the offense which the de-

ever establishes and declares. The pardon, in releasing the offense, obliterating it in legal contemplation, *article v. U. S.*, 16 Wall., 181 [58 U. S. XXI 428], removes the ground of the forfeiture upon which the decree rests, and the source of title is then gone.

But, were this otherwise the constitutional grant to the President, of the power to pardon offenses, must be held to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offenses.

The petitioner being restored, by the pardon, to his rights in the proceeds of the property forfeited, after deducting from them the costs of the legal proceedings, naturally invoked the aid of the court in which the proceedings were had or to which they were transferred, for restitution of the proceeds. Proceedings in confiscation cases are required by the statute to conform as nearly as may be to proceedings in admiralty or revenue cases; and in admiralty it is the constant practice for persons having an interest in proceeds in the registry of the court to intervene by petition and summary proceedings to obtain a delivery of the moneys to which they are entitled. The forty third Admiralty Rule recognizes this right; and in cases without number the right has been enforced. The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid. If from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution. In the present case, it is no answer to the order for restitution that the appellants received the moneys they obtained as officers of the court, and that they have long since ceased to be such officers. If the moneys were illegally taken, they must be restored; and, until a decree of distribution is made and enforced, the summary power of the court to compel restitution remains intact. The power could be applied in no case more fittingly than to previous officers of the court.

The careful and labored reports of the commissioners appointed by the court to examine into the proceedings in the confiscation cases, ascertain the expenses incurred and trace out as far as possible the moneys received, were properly confirmed. There is no objection to their findings which merits consideration.

The decree brought before us for review must be affirmed, except as to the costs of the proceedings subsequent to the presentation of the application of the petitioner. Those costs should be apportioned against the parties ordered to make restitution, according to the respective amounts they are adjudged to restore.

The cause will, therefore, be remanded, with directions to modify the decree in this particular; but, in all other respects,

The decree is affirmed.

Cited—58 U. S., 168, 169; 8 Idem., 288.

ISABELLA McMANUS, as Adminr. of Terence B. McMANUS, Deceased, *Pff. in Err.*

C. O. O'SULLIVAN ET AL., and the Minors, *890*

JOHN P. BUCKLEY ET AL., by C. M. A. BUCKLEY, their Guardian, CHARLES BAUMAN ET AL.

(See S. C., 1 Olin, 578, 579.)

Jurisdiction of state judgments.

This court has no jurisdiction of a judgment in a State Court in which a federal question was not decided, and in which in the view the court below took of the case, such a decision was not necessary.

[No. 543.]

Submitted Jan. 20, 1876. Decided Feb. 7, 1876.

IN ERROR to the Supreme Court of the State of California.

The case is sufficiently stated by the court. *Mrs. Calhoun Benson, E. J. & J. H. Moore, Alexander Campbell and Solomon Heydenfeldt*, for plaintiff in error.

Mrs. John M. Coghlan and William Irvine, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court.

Terence B. McManus, under whom the plaintiff claims, entered into the possession of the premises in controversy in 1854, or thereabouts. He continued his possession until his death in 1861, at or about which time the defendants entered and held adversely to his estate until the commencement of this action in August, 1867.

At the time McManus entered, and during all the time he was in possession, the City of San Francisco was asserting title to the property, under a Mexican *pueblo* right, before the commissioners appointed under the Act of Congress providing for the settlement of private land-claims in California, and before the courts upon appeal. A decree was rendered in favor of the city by the Circuit Court of the United States, May 18, 1865. From this decree an appeal was taken to this court; pending which an Act was passed, March 8, 1866, entitled "An Act to Quiet the Title to Certain Lands Within the Corporate Limits of the City of San Francisco," 14 Stat. at L., 4. Upon the passage of this Act, the appeal was dismissed.

McManus and his representatives do not pretend to connect themselves with the city title by any actual grant. The extent of their claim is, that their possession was evidence of their connection with the true title, which was at that time the city title. Neither do the defendants assert any claim under the true title. Their only defense is, possession, adverse to the estate of McManus, but admitted to be not adverse to the city. Against this the plaintiff insists, that, as the defendants did not claim adversely to all the world, their possession adverse to him could not defeat his right of action.

Thus it will be seen that two questions were properly presented to the Supreme Court of California for adjudication, to wit:

NOTE.—Jurisdiction of U. S. Supreme Court in declare state law void as in conflict with state constitution, to review decrees of state courts as in construction of state laws. Power of States to construe their own statutes. See note to *Jackson v. Lamphire*, 20 U. S. 321, 322.

It is for state court Supreme Court will when specially authorized. Commercial Br. v. 317.

1. Does possession necessarily connect itself with the true title, in the absence of proof to the contrary? And,

2. Is possession, within the meaning of the Statute of Limitation in California, adverse to one who claims title, if it is not also adverse to all the world?

If these questions were decided against the plaintiff, no federal question could be involved. The record, without the opinion of the court, shows that they were presented, and does not show that any federal question was decided. Under such circumstances, it is proper, if it can be at any time, to look to the opinion of the court, which has been sent here with the record, to ascertain whether, in point of fact, the court necessarily passed by the intermediate questions, and actually did decide as to the effect of the *pueblo* right and the treaty, with the accompanying Acts of Congress, upon the title of the plaintiff.

Looking to that, we find that the court decided that possession did not carry with it the presumption that the plaintiff held under the city title; and that, if the possession of the defendants was adverse to him, it was a bar to his right of action, even though it was not adverse to all the world. These are questions within the exclusive jurisdiction of the State Courts, and not subject in any manner to our re-examination. Their decision against the plaintiff made it unnecessary to consider the proposed federal question. Thus it is seen that the federal question was, in fact, not decided; and that, in the view the court below took of the case, such a decision was not necessary. It is clear, therefore, that we have no jurisdiction of this case, and that it must be dismissed.

PETER G. TURNER ET AL., *Appts.*,
v.

CHARLES H. WARD ET AL.

False representations, what sufficient proof of.

1. This case presents little else than a question of fact.

2. In an action to rescind a contract, by reason of false representations, although the representations proven are not in the precise language averred in the bill, yet, if of the same general character, they may be sufficient to justify a decree for plaintiff.

[No. 129.]

Argued Jan. 31, 1876. Decided Feb. 14, 1876.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

This was a bill of equity, filed in the court below by the appellees. The bill sets out that during the months of Feb. and Mar., 1864, the complainants sold certain merchandise upon credit to three of the appellants, defendants below, Turner, Hubbell and Chapin, as partners under the firm name of Turner, Hubbell & Co. In doing so they relied upon representations of Turner, that his firm had a capital invested in their business of from \$20,000 to \$25,000, and that they owed only a few small sums about home; that said representations were untrue, and the firm actually insolvent.

That, on Apr. 1, 1864, Turner, Hubbell & Co. executed two chattel mortgages, each for

\$10,000, on their stock of goods, one to E. & F. P. Bogardus, the other to Charles Hubbell, one of these mortgages being for an indebtedness not exceeding \$8,000, the other for an indebtedness not exceeding \$3,500; that Apr. 11, Turner, Hubbell & Co. assigned all their property and the property of their individual members, to Charles P. Crosby, as trustee for their creditors; that Crosby, in order to get possession of the property covered by the chattel mortgages, obtained, by the aid of Parsons & Dickinson, the money due upon said mortgages, and paid the same over to the mortgagees, and caused the first mortgage to be assigned to Parsons, and the other to Dickinson, as security against the liabilities assumed by them. That at the time the mortgages and assignment were made, the goods purchased of complainants were in the store of Turner, Hubbell & Co., in the original cases, and readily identified, and that the property, other than said goods which came to said Crosby, was sufficient in value to pay the said mortgages. The bill prayed that the right of complainants to repossess themselves of said goods, as against Turner, Hubbell, Chapin and Crosby, be established, and that Parsons & Dickinson be decreed to first sell in satisfaction of the mortgages, the goods other than complainants' covered thereby; and that if, after the satisfaction of said mortgages, any of complainants goods remained, they be decreed to be returned to complainants.

On the part of the complainants, Ward testified that Turner actually made to him the representations set out in the bill, and that the goods were sold in reliance upon their truth. Turner, as a witness for the defendants, denied that he made the representations alleged in the bill, but testified that he told him he thought they had about \$20,000 worth of goods, and that they owed from \$5,000 to \$8,000; that he was informed by the assignee that there was an indebtedness of over \$6,000, of which he knew nothing, for which one of the chattel mortgages was subsequently given and that he did not include this debt in his statement to Ward. The circuit court rendered a decree in favor of the complainants.

Messrs. Charles P. Crosby, J. M. Carlisle and J. D. McPherson, for appellants:

Even if the court should believe that Turner made the representations alleged in the bill, they are not such as would justify the court in setting aside the sale on the ground of fraud. There is no evidence to show that Turner knew the representations to be false, or that he assumed or intended to convey the impression that he had actual knowledge of their truth, although conscious that he had no such knowledge. The preconceived design not to pay is the basis of the right on the part of the seller to repudiate the contract.

Nichols v. Pinner, 18 N. Y., 295; *Hennequin v. Naylor*, 24 N. Y., 139; *Marsh v. Falker*, 40 N. Y., 562.

The complainants are not entitled to a decree in this action, on the uncorroborated testimony of the witness, Ward. The complainants must recover on the case made by their bill, and are not entitled to a decree upon proofs of any different representations than those stated in the bill.

English v. Foxall, 2 Pet., 595; *Hobson v. McArthur*, 16 Pet., 182; *Boone v. Chiles*, 10 Pet.,

177; *Horriam v. Nison*, 9 Pet., 488; *Jackson v. Ashton*, 11 Pet., 329; *Harding v. Handy*, 11 Wheat., 103; *Coleman v. R. B. Co.*, 38 N. Y., 301; *Dugraw v. Elmore*, 50 N. Y., 1; *Ross v. Mather*, 51 N. Y., 106; *Forchies v. Bonstedt*, 16 Wall., 39 (38 U. S., XXI, 271); *Bailey v. Byder*, 10 N. Y., 370; *Wilson v. Stolley*, 4 McL., 375; *Wright v. Delafield*, 35 N. Y., 368.

When the facts alleged in the bill are denied in the answer, they must be proved by two credible witnesses, or one witness with strong corroborating circumstances. Neither bill nor answer here are under oath, an answer on oath being expressly waived by the bill. If the bill and answer had both been sworn to, complainant could have had no relief, as the answer was responsive to the bill, and there could have been no witness in support of it.

Adams' Eq., 4th Am. ed., 137 (21); 2 Story, Eq., sec. 1638; *Bk. v. Gaary*, 5 Pet., 90; *Langdon v. Goddard*, 2 Story, 267; *Hughes v. Blake*, 6 Wheat., 453; *Oreckel v. Lee*, 7 Wheat., 523.

Messrs. Ashley Pond and H. B. Brown, for appellee:

It is unnecessary to allege or prove that the representations were made in bad faith and with intention to deceive. Such allegation and proof is only necessary in an action on the case for deceit. Story, Eq. Jur., sec. 193; *Smith v. Richards*, 13 Pet., 26; *Deas v. Young*, 13 Mich., 291.

It is true that Turner denies the representations literally, as alleged in the bill, and testified to by Ward, but he concedes that he did make representations of the same general character as those alleged. Upon Turner's own testimony complainants were entitled to a decree.

Mr. Chief Justice White delivered the opinion of the court:

This case presents for our consideration little else than a question of fact. The plaintiffs charge, in substance, that they were induced by false representations to sell the defendants certain goods, and asked to have the contract of sale rescinded, and their goods restored. The testimony is all embraced in the depositions of one of the plaintiffs and one of the defendants and an agreed statement. There is some discrepancy between the statements of the two witnesses, but it is apparent from the testimony of the defendant who made the representations complained of, that he himself had been deceived in respect to the pecuniary condition of his firm. It would be but natural, therefore, that he should mislead the plaintiffs. He supposed the firm had stock on hand to the amount of \$90,000 or \$25,000, and owed from \$5,000 to \$8,000. According to his own statement, he so told the plaintiff. In point of fact, he was mistaken, and his statement was untrue. The firm was largely in debt, and in less than sixty days they failed and made an assignment. Before this, however, they executed two chattel mortgages upon the stock, each purporting upon its face to secure the payment of \$10,000, although it appears that the amount actually owing to the mortgagees was not so much.

The representations proven are not in the precise language of those averred in the bill, but they are of the same general character and, in our opinion, sufficient to justify the decree

rendered in the court below; and it is, therefore, affirmed.

WILLIAM H. HOOVER, Assignee of *ELIAS S. OFFENHEIMER*, *Ptff. in Err.*,

ABRAHAM WISE ET AL.

(See R. C., 1 Otto., 306-316.)

Agent, who is—attorney to collect.

1. Where a bank, as a collection agent, receives a note for the purpose of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents, and not the sub-agents of the owner of the note.

2. An attorney employed, not by the creditor but by a collection agent who undertakes the collection of the debt, is the agent of the collecting agent, and not of the creditor who employed that agent; and such attorney's knowledge of the bankrupt condition of the debtor is not chargeable to the creditor.

[No. 808.]

Submitted Jan. 4, 1876. Decided Feb. 14, 1876.

IN ERROR to the Supreme Court of the State of New York.

The case is stated by the court.

Messrs. John H. B. Latrobe and Orlando F. Bump, for plaintiff in error:

A transfer by means of a judgment is out of the ordinary course of business and is, by the Act, therefore, *prima facie* evidence of fraud. This alone constitutes reasonable cause. *In re Kingsbury*, 8 Bk. Reg., 318.

It has accordingly been held that where the creditor has been compelled to sue, he has the required reasonable cause.

Haskell v. Ingalls, 5 Bk. Reg., 205; *In re Walton*, Deady, 443; *Hood v. Karpur*, 5 Bk. Reg., 358; *Zahn v. Fry*, 9 Bk. Reg., 546; *Smith v. Buchanan*, 8 Blatchf., 138; 2 C., 16 Wall., 377 (38 U. S., XXI., 200); *Mayer v. Hermann*, 10 Blatchf., 230; *Pierce v. Howe*, 61 Pa., 415.

The attorneys who obtained the confession of judgment, knew that the debtor was hopelessly insolvent. The principal is chargeable with all the knowledge which his agent had at the time of the transaction.

In re Meyer, 3 Bk. Reg., 423; *Ungewitter v. Von Sachs*, 4 Ben., 167; *Graham v. Stark*, 3 Ben., 330; *Vogel v. Lathrop*, 4 Bk. Reg., 450; *Markson v. Hobson*, 2 Dill., 237; *Mayer v. Hermann* (supra); *The Distilled Spirits*, 11 Wall., 355 (78 U. S., XX., 167); *U. S. v. Wyngail*, 8

agent, may ratify his acts and thereby make them binding on the principal.

1 Pars. Cont., 5th ed., 53; *Newton v. Bronson*, 18 N. Y., 587; 1 Pars. Cont., 5th ed., 57.

Mr. W. W. Boyce, for defendants in error: It results as a conclusion of law from the facts, that the Nebraska attorneys were not respondents' agents.

Mont. Co. Bk. v. Albany City Bk., 7 N. Y., 459; *Com. Bk. of Pa. v. Union Bk. of N. Y.*, 11 N. Y., 211; *Blake v. Ferris*, 5 N. Y., 49; *Kelly v. Mayor*, 11 N. Y., 482; *Pack v. Mayor*, 8 N. Y., 222; *Durst v. Burton*, 47 N. Y., 170; *Linton v. Smith*, 8 Gray, 147; Story, Ag., sec. 454 a, et seq.; *Sproul v. Hemmingway*, 14 Pick., 1; *De Forest v. Wright*, 2 Mich., 368; *Bk. v. Edwards*, 58 N. Y., 544; *Eaton v. R. R. Co.*, 59 Me., 520; *S. C.*, 8 Am. Rep., 480; *Cuff v. R. R. Co.*, 35 N. J., 17; *S. C.*, 10 Am. Rep., 206; *S. C.*, on appeal, 35 N. J., 575; *Kimball v. Cushman*, 103 Mass., 194; *S. C.*, 4 Am. Rep., 581; *Water Co. v. Ware*, 16 Wall., 576 (83 U. S., XXI., 488); *Robbins v. Chicago*, 4 Wall., 679 (71 U. S., XVIII., 482); *Cobb v. Becke*, 6 Q. B., 980; *Robbins v. Fennell*, 11 Q. B., 248; *Yates v. Freckleton*, 2 Doug., 628; *Helps v. Clayton*, 17 C. B. (N. S.), 553; *Mackersy v. Ramsays*, 9 Cl. & F., 818; *Reedie v. London, etc.*, 4 Exch., 244; *Milligan v. Wedge*, 12 Ad. & E., 737; *Rapson v. Cubitt*, 9 M. & W., 710; *Overton v. Freeman*, 11 C. B., 867; *Laugher v. Pointer*, 5 B. & C., 547; *Quarman v. Burnett*, 6 M. & W., 499.

Mr. Justice Hunt delivered the opinion of the court:

This action is brought by an assignee in bankruptcy to recover back a sum of money collected from the bankrupt after the occurrence of several acts of bankruptcy.

Under the practice of the State of New York the case was referred to a referee, upon whose report judgment was entered at the special term in favor of the plaintiff. From this judgment an appeal was taken by the defendants to the General Term.

Upon the hearing at the General Term this judgment was reversed, and a new trial was ordered.

When a judgment is reversed, and a new trial ordered, two modes of proceeding are open to the defeated party, in the practice of the State of New York. He can accept the terms of the order, and take a new trial in the court below. If he supposes that he can make a better case upon the facts than is contained in the report of the referee, this will be his proceeding; if he can make no improvement in this respect, or if he is satisfied to risk his case upon the facts as found, he may take an appeal to the Court of Appeals from the order granting a new trial. To make this appeal effectual, his notice of appeal must contain "A consent on the part of the appellant, that, if the order appealed from be affirmed, judgment absolute shall be rendered against him." Code, sec. 11. The order for a new trial thus becomes a final judgment in the case.

The latter course was adopted in the present instance. The plaintiff appealed to the Court of Appeals, giving the stipulation required for that purpose. The Court of Appeals affirmed the judgment of the General Term, and remitted the record to the Supreme Court, that the judg-

ment might be there entered and enforced. From this judgment, entered upon that *remittitur*, the present writ of error is brought.

It appears from the record that an account or money demand was delivered by its owners to Archer & Co., a collecting agency in the City of New York, and received by them, with instructions to collect the debt, and with no other instructions; that this agency transmitted the claim to McLennan & Archbold, a firm of practicing lawyers in Nebraska City. Several acts of bankruptcy had been committed by Oppenheimer when Mr. McLennan persuaded him to confess judgment for the debt thus sent to him. Proceedings in bankruptcy were instituted against Oppenheimer within four months after such confession, and were prosecuted to a decree of bankruptcy. At the time of receiving the confession, McLennan was well aware of the insolvency of Oppenheimer, and that the confession was taken in violation of the provisions of the Bankrupt Act.

The money collected was remitted to the collection agents in New York from whom he received the claim, but never paid by them to Wise & Greenbaum, the creditors.

When the debt in question was delivered to the collection agency in New York, it was so delivered, as testified by one of its owners, "for collection." "Archer & Co.," he says, "were collection agents in New York. I gave them no directions except to try their best to collect it. They told me they would send it out. (to Nebraska). I gave no other instructions." "The business of Ledyard, Archer & Co. (he says), was to take claims for collection in different parts of the country and, if necessary, have them sued."

Mr. Archer, of the collection firm, testifies that he received the claim for collection; that he told the defendants, if sent on at once he thought it could be collected; that the account was verified by one of the defendants, and sent by the witness to Mr. McLennan, a lawyer, at Nebraska City; that he afterwards told the defendants the account had been put in judgment, and that he hoped to make the money, or the greater part of it. When he made this communication he had McLennan's letter in his hand, and communicated it to the defendants. He further testified that the money had been received by him from McLennan, but had never been paid over to Wise & Co.

The referee held that the knowledge of the condition of the bankrupt by the attorneys residing in Nebraska, who took the confession of judgment, was the knowledge of the creditors in New York. The Supreme Court and the Court of Appeals adjudged otherwise, holding them to be the agents of Archer & Co., and not of Wise & Greenbaum, the creditors. It is upon this point of difference that the case is now presented for decision.

The general doctrine, that the knowledge of an agent is the knowledge of the principal, cannot be doubted. *Bk. v. Davis*, 2 Hill, 451; *Ingalls v. Morgan*, 10 N. Y., 178; *Fulton Bk. v. N. Y. & S. Can. Co.*, 4 Paige, 127.

It must, however, be knowledge acquired in the transaction of the business of his principal, or knowledge acquired in a prior transaction then present to his mind, and which could properly be communicated to his principal. *The*

of decisions have been made, referred to in the opinion.

So, also, there are numerous cases in which the first agent of a note, or claim owner, may have acquired vested rights, as for fees or advances, or other considerations, which, as between themselves, authorized the first agent to control the debt.

But these cases differ very widely from the case before us, in which there is no evidence that the collection agency had a particle of interest, or any right to control the proceedings for collection adversely to the owner of the notes.

The effect of the decision is, that a non-resident creditor, by sending his claim to a lawyer though some indirect agency, may secure all the advantages of priority and preference which the attorney can obtain of the debtor, well knowing his insolvency, without any responsibility under the Bankrupt Law.

Very few creditors, when this becomes well known, will fail to act on the politic suggestion.

Mr. Justice Clifford and *Mr. Justice Bradley* concur in this dissent.

Cited—102. U. S., 268; 7 Biss., 200; 82 Hun, 371; 86 N. Y., 262; 80 Ohio St., 657; 56 Iowa, 488; 41 Am. Rep., 113; 72 Me., 228; 39 Am. Rep., 320.

UNITED STATES, *Appt.*,

v.

JOHN M. ASHFIELD.

(See S. C., 1 Otto, 817-820.)

Pay of watchman.

A watchman in the public grounds in Washington is entitled, under the Act of 1869, to compensation at the rate of \$720 per year.

[No. 645.]

Submitted Jan. 21, 1876. Decided Feb. 14, 1876.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. Edwin B. Smith, Asst. Atty-Gen., and John S. Blair, for appellants.

Messrs. Carlisle & McPherson, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

Ashfield was employed as a watchman in reservation No. 2, part of the public grounds in Washington, from July 1, 1869, until April 12, 1870. He has been paid for his services at the rate of \$720 a year. He claims compensation at the rate of \$900 a year; and this suit is brought to recover the difference between what he has received and what he claims.

The 5th section of the "Act Making Appropriations for Sundry Civil Expenses of the Government for the Year ending June 30, 1867, and for Other Purposes," passed July 28, 1866, 14 Stat. at L., 821, provided "That each watchman in the public buildings and grounds under the commissioner of public buildings, whose pay is less than \$1,000 a year, shall, from the first day of July, 1866, receive a compensation of \$900 per annum." The claimant insists that this provision had not been repealed when he performed

his services, commencing July 1, 1869; and that it fixes the rate of his compensation after that time. It is conceded that there was not, prior to the Appropriation Act for the year ending June 30, 1870, any express change of this provision. The Act making appropriations for the year ending June 30, 1867, provided "for compensation of two watchmen, in reservation No. 2, \$1,200." 14 Stat. at L., 206. At the next session there was included in the deficiency bill, under the head of the "Department of the Interior," an appropriation of the further sum of \$2,000, "to enable the commissioner of public buildings to pay to the watchmen mentioned in the 5th section of the Act * * * the difference between their pay as fixed prior to the passage of that Act and the allowance made by said section." 14 Stat. at L., 374. In the Appropriation Act for the year ending June 30, 1868, \$4,500 was appropriated "For the compensation of five watchmen in reservation No. 2," 14 Stat. at L., 456; and in that for the year ending June 30, 1869, \$5,000 for the same purpose. 15 Stat. at L., 96. The claimant received for his services during the last of these years \$1,000. There was no other provision for this increased compensation than such as may be inferred from the increase of appropriation for the service. He does not now seek to have his compensation regulated by this Act. In his petition he only asks to be paid in accordance with the Act of 1866, and at the rate of \$900 a year.

In the "Act Making Appropriations for the Legislative, Executive and Judicial Expenses of the Government for the Year Ending June 30, 1870," under the head of "Public Buildings and Public Grounds," \$3,000 was appropriated "for compensation of watchmen in reservation No. 2." 15 Stat. at L., 286. There is no designation of the number to be employed. At the end of the first paragraph, under the head of "Department of State," after certain appropriations, a proviso is inserted in the following words: "Provided that the pay of any messenger in either of the departments, executive or judicial, of the Government, shall be \$840 per annum, and no more; * * * and the pay of all laborers and watchmen * * * employed as afore stated shall be \$720 per annum, and no more," p. 287. And at the end of the appropriations, under the head of the "Department of Agriculture," these words are found: "And this Act shall not be so construed as to reduce the compensation of any *employé* of the Government below the amount allowed in the last or present appropriation bill," p. 298.

If five watchman should be employed for the year commencing July 1, 1868, the appropriation actually made would give them compensation only at the rate of \$600 a year, if equally divided between them. The findings of the Court of Claims do not show how many were employed; but in the Deficiency Bill of April 20, 1870, 16 Stat. at L., 90, \$600 was appropriated "to pay five watchmen, employed in reservation No. 2, \$120 each, in order to make their entire pay for the current year \$720 each." Thus it appears that five watchmen were actually employed in these grounds, and that the appropriation as originally made left a deficiency for their compensation at the rate of \$720.

The office of Commissioner of Public Build-

ings was created by the Act of April 29, 1816. 3 Stat. at L., 324, sec. 2. The commissioner was, for certain purposes, placed under the supervision of the President. On the 8d March, 1849, the Department of the Interior was established, 9 Stat. at L., 395, and the supervisory powers of the President over the commissioner were transferred to the secretary of that department. Sec. 8. In the Appropriation Act of Aug. 4, 1854, 10 Stat. at L., 573, sec. 15, it was made the duty of the commissioner to report his operations annually to the Secretary of the Interior, and to submit to the same officer his estimates for approval and transmission to Congress with the annual message of the President. On the 2d March, 1867, the office of Commissioner of Public Buildings was abolished, and its duties transferred to the Chief Engineer of the Army. 14 Stat. at L., 466, sec. 2.

Under the ruling of this court in *Manning's* case, 13 Wall., 579 [80 U. S., XX., 706], the office of Commissioner of Public Buildings, being under the supervision of the Department of the Interior, was a Bureau or division of that department. That was one of the executive departments of the Government. The Chief Engineer of the Army performs the duties which belonged to the commissioner. He is under the supervision of the Department of War, which, by the Act of March 30, 1867, was charged with the direction of the expenditure of all moneys appropriated for the public works of the district. 15 Stat. at L., 12. We are, therefore, clearly of the opinion that Ashfield was a watchman employed in one of the executive departments of the Government. For this reason, he comes within the operation of the proviso of the Act of 1869 which has been stated. It makes no difference that the proviso is inserted in that part of the Act which relates to appropriations for the Department of State. It is general in its language, and applies to watchmen in each of the several executive and judicial departments.

Neither do we think it affects the case, that at the head of the Act, and after the enacting clause, the word "legislative" appears. The Act is one making appropriations for the legislative, executive and judicial departments; but there is no attempt to assign the particular subject of appropriation to any one of these several departments. The appropriation is made for the purpose specified, and the laws organizing the several departments assign it to the one to which it properly belongs. If the theory on which the argument proceeds is correct, then all the appropriations made by the Act are for the Legislative Department; for there is nothing to separate the executive and judicial departments from the legislative, any more than there is the public grounds. The different subdivisions of the section are intended to classify the appropriations, not to designate the department to which they belong.

The compensation of the watchmen in reservation No. 3 was fixed, therefore, for the year ending June 30, 1870, at \$720, unless the proviso which so declares is overcome by the subsequent clause declaring that nothing in the Act should be so construed as to reduce the compensation of any *employé* below the amount allowed in the last or present appropriation bill. As has been seen, the last previous appropriation bill did not in terms allow or fix any special rate of compensation for this service. On that account, the claimant in this case seeks to avail himself of the Act of 1866. But that is not one of the appropriation bills referred to in this saving clause. We are left, then, to the Act of 1869 alone; and that fixes the rate at \$720. The clause relied upon was undoubtedly intended to provide for cases where the appropriation made was not sufficient to pay in full at the rate of compensation fixed.

There is nothing in the record sent here by the Court of Claims to show that the United States presented any counter-claim before the case was heard and decided. The addition to the record, which has been made, fails to show at what time the counterclaim was presented to the court below, or that it was ever filed in the cause.

The judgment is reversed and the cause remanded, with instructions to dismiss the petition.

UNITED STATES, *Appt.*,

v.

THE CORLISS STEAM-ENGINE COMPANY.

(See S. C., 1 Otto, 321-323.)

Power of Secretary of the Navy to suspend work on contract—pay for partial performance—settlement, when binding.

*1. Where the Secretary of the Navy possesses the power, under the legislation of Congress and the orders of the President, to enter into contracts for work connected with the construction, armament or equipment of vessels of war, he can suspend the work contracted for when from any cause the public interest may require its suspension; and where such suspension is ordered, he is authorized to settle with the contractor upon the compensation to be paid for the partial performance of the contracts.

2. When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation or fraud, it is equally binding upon the Government and the contractor. [No. 704.]

Submitted Jan. 21, 1876. Decided Feb. 14, 1876.

A PPEAL from the Court of Claims.

The case is stated by the court.

Messrs. S. F. Phillips, Solicitor-Gen., and Thomas Simons, Asst. Atty-Gen., for appellants.

Mr. Joseph Casey, for appellee.

Mr. Justice Field delivered the opinion of the court:

This case comes before us on appeal from the Court of Claims, and involves a consideration of the validity and binding character of a settlement, made between the Secretary of the Navy and the claimant, for work performed by the latter upon contracts with the Navy Department. There is no dispute about the facts of the case. They are fully and clearly stated in the findings of the Court of Claims. And it would seem that there ought not to be any dispute as to the law applicable to them. The validity of the contracts is not questioned. The work upon them was done under the supervision of an inspector of the Navy Department, and no complaint is made of the manner in

* Head notes by *Mr. Justice FIELD*.

which it was done. When, in 1869, the department, upon the recommendation of a Board of officers of the Navy appointed by it, suspended the further progress of the work under the contracts, the claimant made a written proposition, in the alternative, either to take all the machinery and receive \$150,000, or to deliver it in its then incomplete condition at the Navy Yard at Charlestown for \$259,068, payable on delivery there. The department accepted the latter proposition, recognizing the amount specified as the balance due on settlement of the contracts; stating, however, that, in consequence of the very limited appropriations, only a partial payment would be made on delivery of the machinery at the Charlestown Navy Yard, and that the balance could not be paid until Congress should make a further appropriation, but that a certificate for the amount due would be given to the claimant.

The machinery was accordingly delivered at the Navy Yard, with the exception of a few articles, for which a deduction from the amount of the settlement was allowed, and the certificate stipulated was given to the claimant. Previous to this, however, the Chief Engineer of the Navy, under direction of the department, examined the machinery and made a detailed report, by which the department was fully informed of its condition, the progress made in its construction, and what remained to be done for its completion under the contracts. There is no allegation or suggestion that the claimant was guilty of any fraud, concealment or misrepresentation, on the subject; but on the contrary, it is clear that every fact was known to both parties, and that the whole transaction, as stated by the court below, was unaffected by any taint or infirmity. If such a settlement, as the *Chief Justice* of the Court of Claims very justly observes, accompanied by the giving up by one, and the taking possession by the other of the property involved, cannot be judicially maintained, it would seem that no settlement by any contractor with the Government could be considered a finality against the Government.

The duty of the Secretary of the Navy, by the Act of April 30, 1798, creating the Navy Department, extends, under the order of the President, to "the procurement of naval stores, and materials, and the construction, armament, equipment and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States." 1 Stat. at L., 558. The power of the President in such cases is, of course, limited by the legislation of Congress. That legislation existing, the discharge of the duty devolving upon the Secretary necessarily requires him to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him. As, in making the original contracts, he must agree upon the compensation to be made for their entire performance, it would seem that when those contracts are suspended by him, he must be equally authorized to agree upon the compensation for their partial performance. Contracts for the armament and equipment of vessels of

war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in ship-building and steam machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.

When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation or fraud, it must be equally binding upon the Government as upon the contractor; at least, such a settlement cannot be disregarded by the Government without restoring to the contractor the property surrendered as a condition of its execution.

But aside from this general authority of the Secretary of the Navy, under the orders of the President, he was, during the rebellion, specially authorized and required by Acts of Congress, either in direct terms or by specific appropriations for that purpose, to construct, arm, equip and employ such vessels of war as might be needed for the efficient prosecution of the war. In the discharge of this duty, he made the original contracts with the claimant. The completion of the machinery contracted for having become unnecessary, from the termination of the war, the Secretary, in the exercise of his judgment, under the advice of a Board of naval officers, suspended the work. Under these circumstances, we are of opinion that he was authorized to agree with the claimant upon the compensation for the partial performance, and that the settlement thus made is binding upon the Government.

Decree affirmed.

ALEXANDER M. EARLE, MORRIS D. EARLE AND JAMES EARLE, Partners, trading under the Firm Name of EARLE & COMPANY, Appts.,

v.

JAMES H. McVEIGH.

(See S. C., 1 Otto, 503-510.)

Insufficient service of process.

1. A law requiring service to be made by posting the process on the door of defendant's dwelling-house, is not complied with if it appears that the house on which it was posted was not the usual place where the defendant or his family resided at the time.

2. No man can be condemned in his person or property, without notice and an opportunity to be heard in his defense.

[No. 181.]

Argued Jan. 31, 1876. Decided Feb. 14, 1876

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

This was an action brought by Jas. H. McVeigh, the appellee, against the appellants.

The object of the suit was to restrain the appellants from enforcing certain judgments which they had obtained against said McVeigh

The case is fully stated by the court.

Mr. S. Ferguson Beach, for appellants.
Messrs. P. Phillips and **John Howard**, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Due notice to the defendant is essential to the jurisdiction of all courts, as sufficiently appears from the well known legal maxim, that no one shall be condemned in his person or property without notice, and an opportunity to be heard in his defense. *Nations v. Johnson*, 24 How., 203 [65 U. S., XVI., 681].

Such notice may be actual or constructive, as prescribed by law. Where actual notice is required, personal service, in a legal manner, of due process, is a compliance with the requirement; and, in cases where constructive notice is allowed, the duty of the moving party is fulfilled if he complies in every respect with the law, usage or rule of practice, as the case may be, which prescribes that mode of service.

Two suits were commenced by the respondents against the present complainant, and his son, who was not served, to enforce the payment of the several promissory notes described in the declarations in those suits; and the plaintiffs therein obtained service of process in the respective suits on the same day in the words following:

"Executed the within summons Feb. 24, 1862, on James H. McVeigh, by leaving a copy thereof posted at the front door of his usual place of abode; neither he nor his wife, nor any white person, who is a member of his family and above the age of sixteen years, being found at his said usual place of abode."

Declarations in due form were filed in the respective suits; and, the defendant not appearing in either, judgment was rendered against him in the first suit for the sum of \$3,535.49, and in the second for the sum of \$8,014.84, with interest in each case, as set forth in the record.

Executions were regularly issued, and returns were made of *nulla bona*; and thereupon the creditors filed their bill of complaint, in the county court, in which they set up the said judgments and alleged that the defendant had no personal assets, and prayed that the lien of their judgments might be enforced by a sale of the real estate of the defendant for the satisfaction of the same; that the defendant might be required to answer the allegations of the bill of complaint; and that a commissioner might be appointed to report the real estate owned by defendant, together with the incumbrances, if any, upon the same; and that the court will enter such decree in the case as the circumstances may require.

Personal service could not be obtained; and, the defendant having failed to enter an appearance or to give bond as required, the court made an order of publication, and directed that a copy of the order be inserted in the "State Journal" once a week for four successive weeks, and that the same be posted at the front door of the court-house of the county.

Proof of publication was exhibited, and the person appointed to ascertain what real estate was owned by the defendant made a report; and it appearing that the rents and profits of his real estate would not suffice to pay the

plaintiffs' judgments and others mentioned in the same report, within five years, the court did further order, adjudge and decree that so much of the same as was requisite for the purpose should be sold at public auction, and prescribed the terms of sale, and appointed a commissioner to carry the decree into effect.

Pursuant to the decree of the court, the commissioner advertised the real estate for sale, as appears by a copy of the advertisement exhibited in the record. Enough appears to show that the sale of the real estate was postponed to a later day than that named in the advertisement, and that the defendant, in the meantime, filed an injunction bond in the case, in which it is recited that the defendant had obtained from the judge of the eleventh circuit of the State an injunction enjoining and restraining the said creditors and the commissioner, until an order is granted by the county circuit court to the contrary, from any proceedings to enforce the payment of the said two judgments. Pending the temporary injunction, the defendant sued out a summons commanding the said judgment creditors to appear at the rules of the said court, on the day therein named, to answer to the bill of complaint filed in the said court by the debtor in the said judgments.

Sufficient appears to show that the intent and purpose of the bill of complaint were to obtain a decree enjoining and restraining the said judgment creditors from any proceeding to enforce the payment of the two judgments described in the aforesaid decree of sale; and with that view the judgment debtor alleged that the return to the process in each of those suits was false and fraudulent; that the process was not posted at the front door of his usual place of abode as the law directs, and that the respective judgments are illegal, and should be set aside; that the family of the debtor left there six weeks before the federal forces occupied the place, and that the defendant in those suits left there and joined his family within the Confederate lines six days subsequent to the entry there of the federal forces, and that he ever after remained with his family within the Confederate lines until the close of the war, and that these facts were well known to the judgment creditors and their counsel.

Service was made, and the judgment creditors appeared as respondents, and filed an answer.

Reference will only be made to a single allegation of the answer, as the others are not material in this investigation. They allege that the return of the process which led to the judgments in each of the two suits "Was and is true in every particular, and was and is in no respect false and fraudulent; and that the process in each case was, in fact, executed in exact conformity with the return." No answer having been filed by the commissioner appointed to make the sale, the bill of complaint as to him was taken as confessed, and the complainant filed the general replication to the answer of the other respondents. Hearing was had upon the bill, exhibits and answer before the judge of the eleventh circuit of the State pursuant to notice, and on the motion of the respondents to dissolve the temporary injunction; and it appears from the record that the motion of the respondents was overruled. Whereupon the respondents filed a petition praying for the re-

removal of the cause into the next Circuit Court of the United States for the Eastern District of the State; and the record shows that the petition was granted.

Prior to the removal of the cause, the same had been set down for hearing, but no proofs had been taken; and, instead of taking proofs, the solicitors entered into a stipulation, that on the trial it should be admitted that the complainant was a resident of that city for many years prior to the federal occupation during the rebellion; that, during that time he was extensively engaged in business there, and was the head of a family, owning a dwelling-house, in which he resided, and other real estate; that he sympathized with the rebellion, but did not engage in the military or civil service of the insurgents; that his absence from the city, throughout the rebellion, was not one which he regarded as absolute and permanent, but contingent and temporary, depending for its continuance upon the fortunes of the war.

Both parties were again heard in the Circuit Court of the United States; and the court entered a decree that the injunction heretofore granted in the cause be perpetuated, and that the respondents pay to the complainant his costs; and the respondents entered an appeal to this court.

Argument to show that no person can be bound by a judgment, or any proceeding conducive thereto, to which he was never a party or privy, is quite unnecessary, as no person can be considered in default with respect to that which it never was incumbent upon him to fulfill. Standard authorities lay down the rule, that, in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose. *Borden v. Fitch*, 15 Johns., 141.

Notice to the defendant, actual or constructive, is an essential prerequisite of jurisdiction. Due process with personal service, as a general rule, is sufficient in all cases; and such it is believed is the law of the State where the judgments were recovered in this controversy, in all cases where such service is practicable. But the laws of that State also provide for service in three classes of cases in which personal service cannot be effected: (1) Residents who are temporarily absent from home. (2) Service may also be made upon persons not residents of the State. (3) Where the party resides in the State, in case it is not known in what particular county he has his residence.

1. Temporary absence from home will not defeat service, as in that case the statute provides that notice may be given to the party by delivering a copy of the process to the party in person; or, if he be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife, or any white person found there, who is a member of his family, and above the age of sixteen years; or, if neither he nor his wife nor any such white person be found there, by leaving such copy

posted at the front door of his usual place of abode.

2. Persons not residing in the State may, in a proper case, be served by the publication of the notice once a week for four consecutive weeks in a newspaper printed in the State. Code 1860, p. 703.

3. Provision is made in respect to the third class, that on affidavit that a defendant is a non-resident of the State, or that diligence has been used to ascertain in what county or corporation he is, without effect, or that process, directed to the officer of the county or corporation in which he resides or is, has been twice delivered to such officer more than ten days before the return-day, and been returned without being executed, an order of publication may be entered against such defendant. Code, p. 707.

Doubtless constructive notice may be sufficient in certain cases; but it can only be admitted in cases coming fairly within the provisions of the statute authorizing courts to make orders for publication, and providing that the publication, when made, shall authorize the court to decide and decree. *Hollingsworth v. Barbour*, 4 Pet., 475; *Regina v. Lightfoot*, 26 Eng. L. & E., 177; *Nations v. Johnson* [*supra*]; *Galpin v. Page*, 18 Wall., 369 [85 U. S., XXI., 963].

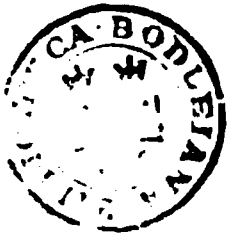
When the law provides that notice may be posted on the "front door of the party's usual place of abode," in the absence of the family, the intention evidently is that the person against whom the notice is directed should then be living or have his home in the said house. He may be temporarily absent at the time the notice is posted; but the house must be his usual place of abode, so that, when he returns home, the copy of the process posted on the front door will operate as notice; which is all that the law requires. By the expression, "the usual place of abode," the law does not mean the last place of abode; for a party may change his place of abode every month in the year. Instead of that, it is only on the door of his then present residence where the notice may be posted, and constitute a compliance with the legal requirement.

Apply that rule to the case before the court, and it is clear that the notice was insufficient. Neither the complainant nor his family resided there; on the contrary, the case shows that his family left that city six weeks before the same was occupied by the federal forces, and that they departed, leaving no white person in the house from which they departed, and that these facts were well known to the attorney of the respondents and to the officer who made the returns in question, which was made seven months after the complainant had left the county and was residing within the Confederate lines.

Tested by these considerations, it is clear that the house where the notice, if any, was posted, was not at that time the usual place of abode of the defendant in those suits; and it follows that the judgments founded on such defective notices are absolutely void.

Special reference is made to the Act of the 10th of February, 1862, as having some bearing on the case; but the record shows that the pres-

1.—Not found in 26 Eng. L. & E., 177, but is reported in 6 El. & B., 822. Ed.



ent complainant had left his former residence seven months before the passage of that Act, and followed his family within the insurgent lines. He abandoned the business in which he was engaged, and was known, as is admitted in the stipulation of the parties, throughout the whole period of the rebellion, as having sympathized with it and adhered to its fortunes.

Other defenses failing, it is suggested by the respondents that the complainant, when he departed from the city, left an agent resident there; but it is a sufficient answer to that suggestion to say that the agent referred to did not reside in the house where it is alleged the notices were posted, and that he had no authority whatever to accept or waive notice to the complainant in any such proceeding.

Concede that due service might have been made under the Act providing for proceedings against non-residents; still, it is clear that the concession cannot benefit the respondents, as they did not attempt to comply with the conditions contained in either section of that Act. Sess. Acts, 1861, p. 58.

Viewed in any light, it is plain that the case falls within the rule that the service of process, by posting a copy on the door of a dwelling-house, is not a good service, if it appears by competent evidence that the house was not the usual place where the defendant or his family resided at the time the notice was posted. *Harris v. Hardeman*, 14 How., 340; *Buchanan v. Rucker*, 9 East, 192; *Boswell v. Otis*, 9 How., 350; *Oakley v. Aspinwall*, 4 N. Y., 518.

Even in proceedings *in rem*, notice is requisite in order that the sentence may have any validity. Every person, said Marshall, *Ch. J.*, may make himself a party to such a proceeding, and appeal from the sentence, but notice of the controversy is necessary in order that one may become a party; and it is a principle of natural justice, of universal obligation, that, before the rights of an individual can be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. *The Mary*, 9 Cranch, 144.

No man shall be condemned in his person or property without notice, and an opportunity to be heard in his defense, is a maxim of universal application; and it affords the rule of decision in this case.

Decree affirmed.

Cited—3 Hughes, 389; 3 Wood, 101; 19 Kan., 461, 463; 27 Am. Rep., 151, 152, 153.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, *Plff. in Err.*,

v.

DAVID FRANCE AND LUCETTA P. FRANCE, HIS WIFE, to use of SAMUEL B. SELVAGE.

(See S. C., 1 Otto, 510-516.)

Policy, when void for false statements—materiality of statement.

1. When an insurance policy contained the clause: that if the proposals, answers and declaration made by the insured should be in any respect false or fraudulent, then the policy should be void, and that any untrue or fraudulent answer should render it

void, all the statements contained in the proposal must be true or the policy will be void.

2. The materiality of such statements is removed from the consideration of a court or jury, by the agreement of the parties that such statements are absolutely true; and that if untrue in any respect, the policy shall be void.

[No. 182.]

Argued Feb. 1, 1876. Decided Feb 14, 1876.

[N ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of *assumpsit* upon a policy of life insurance originally brought in the State District Court for the City and County of Philadelphia, by the defendants in error, citizens of Pa. against the plaintiffs in error, a Corporation of Connecticut. The action was removed by the defendants below to the United States Circuit Court. The policy was for \$10,000 upon the life of one Andrew J. Chew, for the benefit of his sister, Lucetta P. France. It had been transferred, as collateral security for a loan, to Samuel B. Selvage.

The case further appears in the opinion.

Mr. Samuel C. Perkins, for plaintiffs in error, upon the branch of the case considered by the court here, relied chiefly on *Jeffries v. Life Ins. Co.*, 22 Wall., 47 (89 U. S., XXII., 838); citing also, *Anderson v. Fitzgerald*, 4 H. of L. Cas., 484; *Campbell v. Life Ins. Co.*, 98 Mass., 381; *Holabird v. L. Ins. Co.*, 2 Dill., 166, note; *Miles v. L. Ins. Co.*, 3 Gray, 580; *Voss v. Eagle, etc., Co.*, 6 Cush., 42; *State Mut. Ins. Co. v. Arthur*, 80 Pa., 315.

Mr. Nathan H. Sharpless, for defendants in error, cited *Ins. Co. v. Wilkinson*, 18 Wall., 222 (80 U. S., XX., 617); *Ins. Co. v. Francisco*, 17 Wall., 672 (84 U. S., XXI., 698).

Mr. Justice Hunt delivered the opinion of the court:

The action was *assumpsit* to recover \$10,000, the amount of a policy insured upon the life of Andrew J. Chew in July, 1865. The issuing of the policy, the death of Chew, and the service of the necessary proofs of his death, are not seriously disputed.

The policy contained the following clause:

"And it is also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers and declaration made by said Andrew J. Chew, and bearing date the 12th day of July, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void."

The issuing of the policy was preceded by a proposal for insurance, which contained a number of questions propounded to Chew by the Company, with the answers made by him.

In relation to such questions and answers, the policy contained this clause:

"It is hereby declared that the above are correct and true answers to the foregoing questions; and it is understood and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, shall render the policy null

and void, and forfeit all payments made thereon."

Among others were the following questions and answers, viz.:

Question.	Answer.
"4. Place and date of birth of the party whose life is to be insured?"	"4. Born in 1835, (interlined Oct. 28th), Gloucester County, N. J.
"5. Age next birthday?"	"5. Thirty years.
"11. Has the party ever had any of the following diseases? if so, how long, and to what extent?—palsy, dropsy, palpitation, spitting of blood, epilepsy, yellow fever, consumption, rupture, apoplexy, asthma, convulsions, paralysis, bronchitis, disease of the heart, disease of the lungs, insanity, gout, fistula, affection of the brain, fits.	"11. None."

Evidence upon both sides was given as to the age of Chew, tending to show that he was thirty-seven years old, or at least thirty-five years old, when he signed the application, and upon the question of his having suffered from a rupture. Before the case was submitted to the jury, a number of requests to charge were made by the judge, which will be referred to presently.

In its main features, this case bears a close resemblance to that of *Jeffries v. Ins. Co.*, decided at the last Term of this court. 22 Wall., 47 [89 U. S., XXII., 833]. In that case, as in this, it was insisted that the falsity of a statement made in the application did not vitiate the policy issued upon it, unless the statement so made was material to the risk assumed. The opinion then delivered contains the following language in answer to that claim:

"The proposition at the foundation of this point is this, that the statements and declaration made in the policy shall be true.

This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They may not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression; what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the Company."

This decision is so recent, and so precise in its application, that it is not necessary to go back of it. It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of a court or jury by the agreement of the parties that such statements are absolutely true, and that, if untrue in any respect, the policy shall be void.

The judge was requested to charge:

Fifthly. If the jury believe that the answers to questions Nos. 4 and 5 in the application for insurance, as to the date of birth and age next birthday, of said Andrew J. Chew, were false

and untrue, the policy issued upon the application is void, and their verdict must be for the defendants.

In response to this request, the judge said: "If the jury believe that the answer to the questions numbered 4 and 5 were materially untrue as to the age of the said Andrew J. Chew, the policy is void and the verdict must be for the defendants." The defendants were entitled to the charge they requested, without the addition made by the judge of the word "materially." The judge, however, proceeded to say, "And if he was thirty-seven, or even thirty-five years old, the difference was not immaterial. I give the fifth instruction as requested."

The process of reasoning by which the learned judge reached his conclusion on this point we have held to be erroneous, viz.: that, to make the representation important, it must be material to the risk assumed; that the representation that he was but thirty years old, when he was thirty-seven, or even thirty-five, was material to the risk; and, if the jury believed that he was of the greater age mentioned, their verdict must be for the defendants, and therefore he charged as requested. The charge should have been, that, as Chew had represented himself to be but thirty years of age, if the jury found him then to be thirty-five years old the false statement would avoid the policy, and they must find for the defendants; resting his direction upon the falsity alone of the statement.

Still, we do not see that the defendants can ask relief for this reason. The charge was right, and could not be misunderstood by the jury. The allegation of the defendants was that Chew had misrepresented his age in the manner stated and, therefore, the policy should be adjudged void. The judge charged that, if he had so misrepresented, the policy was void, and the verdict must be for the defendants. We think no valid exception can be taken to this charge.

Upon the subject of the disease of rupture, or of having been ruptured, the record gives this statement, viz.: the defendants requested the court to charge the jury:

6. If the jury believe that the answer to question No. 11 in the application for insurance, whether said Andrew J. Chew ever had any of the diseases therein specified, etc., was false and untrue as to any one of said diseases, the policy issued upon the application is void, and their verdict must be for the defendants.

7. If, at the time when the application for insurance was made and the policy issued, Andrew J. Chew was or had been ruptured, he was bound, in answer to question No. 11, to state the fact, and also how long, and to what extent; and, if the jury believe that at the time mentioned he was or had been ruptured, his answer "None" to said question No. 11 was untrue and false, and their verdict must be for the defendants.

The judge declined thus to charge, but said: "If you believe that Andrew J. Chew was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured; or if at that time, or within any such prior period, he wore a truss in order that he might repress hernial extrusion; your verdict should, in either case, be for

the defendants. But though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870 from an extraordinary exertion of strength in lifting a heavy weight, yet if you find that from 1855, or thereabouts, until after the last insurance in 1865, he had no such disease and was, in all this interval, in the habit of working, and using bodily exercise and occasionally dancing, bathing and traveling and could walk long distances without being fatigued and either did not wear a truss or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium; and that there was, in this respect, no falsehood or willful suppression—I cannot give the instruction severally requested in the absolute form in which it is expressed."

This charge was erroneous. It left to the decision of the jury, and under circumstances of much embarrassment, a question which the parties had themselves determined. An ordinary jury of twelve men, without the aid of experts, are poorly qualified to determine a question of medical science. To submit to a jury the question, conceding the fact that Chew was ruptured in the year 1846, and again in the year 1854, and again in a worse form in the year 1870, whether, during an intermediate period from 1855 to 1865, he had no disease of rupture, and that the jury might decide that because he walked and worked and danced and bathed without fatigue, and either did not wear a truss or wore it only from continuance of early habit, that his health was not impaired, is to impose a great strain upon the powers of a jury. In the ordinary course of things, persons not skilled in medical science could not know what caused a rupture, whether at any particular time the disease was conquered, because its appearance was not then present, or whether it was suspended to re-appear sooner or later. Hernia or rupture appears in infants of but a few days old; in youth, maturity and extreme old age. It manifests itself in the abdomen, the groin, the scrotum, the navel and the thigh. It is external, or may be internal only. Lawrence, Rupture, pp. 4, 10. The author quoted says that this "Complaint affects indiscriminately persons of both sexes, of every age, condition and mode of life. * * * It is true," he says, "that a hernia, if properly managed, is not immediately dangerous to the patient, does not affect his health, or materially diminish his enjoyments; but it is a source of constant danger, since violent exercise or sudden exertion may bring it from a perfectly innocent state into a condition which frequently proves fatal. * * * The treatment of rupture," he adds, "demands from all these circumstances as great a combination of anatomical skill, with experience and judgment, as that of any disorders in surgery." Pp. 2, 3.

These facts illustrate the gravity of the error committed on the trial of the cause.

The facts and circumstances stated should not have been given to the jury for their judgment. The parties had themselves adjudged and agreed what should be the result if certain facts existed. It was for the jury to determine whether the facts existed; and, according as

they determined upon that point, the one or the other result must necessarily follow. Thus the applicant, when she asked for a policy of insurance, expressly agreed that the answers made by Chew to the questions put to him should be true, and that, if any of them were false, the policy issued to her should be void. She expressly declared, again, that the answers made by him were true; that they formed the basis of the contract of insurance, and that any untrue answer should render the policy void.

It was alleged by the defendants, that when Chew was asked whether he "had ever had any of the following diseases," among which was "rupture," and to which he answered "None," that such answer was untrue.

We decided, in the case of *Jeffries v. Ins. Co.*, *supra*, that the question of the materiality of the answer did not arise; that the parties had determined and agreed that it was material; that their agreement was conclusive on that point; and that the only questions for the jury were: first, was the representation made? Second, was it false? This principle was precisely embraced within the requests 6 and 7 made in this case, and the judge erred in not charging as therein requested.

New trial granted.

Cited—104 U. S., 203; 111 U. S., 341; 3 Hughes, 266; 45 Wis., 654; 36 Ohio St., 208; 38 Am. Rep., 576.

CHRISTIAN S. EYSTER, *Plff. in Err.*,
v.

THOMAS GAFF ET AL.

(See S. C., 1 Otto, 521-526.)

Mortgage foreclosure, effect of bankrupt proceedings on—actions against bankrupt.

1. Where a mortgage foreclosure is commenced and the mortgagor is, during the foreclosure, declared a bankrupt, his assignee in bankruptcy takes the title subject to such foreclosure proceedings, and his rights are foreclosed by the subsequent decree and sale.

2. The proceedings in the foreclosure suit, after the appointment of the assignee in bankruptcy, are not void because he was not made a party.

3. The adjudication of bankruptcy did not deplete the other court of jurisdiction in the foreclosure suit.

4. The debtor of a bankrupt loses none of his rights by the bankruptcy of his adversary. The same courts remain open to him, and the Bankrupt Act has not divested those courts of jurisdiction in actions against the bankrupt.

[No. 134.]

Argued Feb. 1, 2, 1876. Decided Feb. 14, 1876.

IN ERROR to the Supreme Court of the Territory of Colorado.

The case is stated by the court.

Messrs. John A. Wills and C. S. Eyster, in person, for plaintiff in error:

In support of the proposition that it was the duty of the mortgagees to make the assignee a party, see, *Oleland v. Sedgwick*, 7 Paige, 290; *Deas v. Thorne*, 3 Johns., 544; *Springer v. Vanderpool*, 4 Edw. Ch., 362; *Lowry v. Morrison*, 11 Paige, 339; *Randall v. Mumford*, 18 Ves., 424; *Montith v. Taylor*, 9 Ves., 615; *Ex parte Berry*, 1 Dick., 81.

That, after the bankruptcy of McClure, the mortgagor, the sale of the mortgaged property under foreclosure proceedings in the state court conveyed no title to the purchaser, the property being then in the care of the assignee, see *Phelps v. Sellick*, 8 Bk. Reg., 892; *Wiswall v. Sampson*, 14 How., 65; *Ex parte Christy*, 3 How., 292; *Peck v. Jenness*, 7 How., 612; *Bk. v. Campbell*, 14 Wall., 95 (81 U. S., XX., 888); *Taylor v. Carryl*, 20 How., 588 (61 U. S., XV., 1028); *Angel v. Smith*, 9 Ves., 335.

Messrs. Shellabarger & Wilson, W. S. Holman and P. Phillips, for defendants in error.

Mr. Justice Miller delivered the opinion of the court:

This suit was an action of ejectment brought originally by Thomas and James Gaff against plaintiff in error in the District Court of Arapahoe County, Colorado, in which the plaintiffs below had a recovery, and that judgment was affirmed on appeal by the Supreme Court of that Territory.

The title to certain lots in Denver City is the subject of controversy; and there seems to be no difficulty in considering George W. McClure as the source of title, common to plaintiffs and defendant. McClure had made a mortgage on the lots to defendants in error to secure payment of the sum of \$18,000.

A suit to foreclose this mortgage was instituted in the district court in 1868, which proceeded to a decree and sale, and plaintiffs became the purchasers, receiving the master's deed, which was duly confirmed by the court.

This decree was rendered July 1, 1870. On the 9th day of May preceding, the mortgagor, McClure, filed a petition in bankruptcy, and on the 11th day of May he was adjudged a bankrupt, and on the 4th day of June, John Mechling was duly appointed assignee. The bankrupt filed schedules in which these lots and the mortgage of the Gaffs on them were set out. It will thus be seen that, pending the foreclosure proceedings which had been instituted against McClure, he had been declared a bankrupt, and Mechling had been appointed his assignee; and that the decree of sale and foreclosure under which plaintiffs asserted title in the present suit was rendered about a month after the appointment of the assignee, and nearly two months after the adjudication that McClure was a bankrupt. The defendant in the ejectment suit was a tenant under McClure, and defends his possession on the ground of the invalidity of the foreclosure proceedings after the adjudication of bankruptcy and the appointment of the assignee.

The plaintiffs in this suit seem to have relied at first upon the right to recover under the mortgage, and did not give in evidence the proceedings in foreclosure; but when the defendant had read them, so far as the decree and sale, in order to show that the mortgage was merged, the plaintiffs then produced the master's deed. The Supreme Court of Colorado held that the mortgage alone was sufficient to sustain the action, one of the judges dissenting; and the counsel for defendant below insists here that this was error, because the laws of Colorado give to a mortgage only the effect of an equitable lien, and not that of conveying a legal title. He also insists that all the proceed-

ings in the foreclosure suit after the appointment of the assignee in bankruptcy are absolutely void, because he was not made a defendant.

We will consider this latter proposition first; for, if the foreclosure proceedings conveyed a valid title to plaintiffs, the judgment must be affirmed, whatever may be the true solution of the question of local law.

It may be conceded, for the purposes of the present case, that the strict legal title to the land did not pass by the mortgage, and that it did pass to the assignee upon his appointment; and consequently, if that title was not divested by the foreclosure proceedings, it was in the assignee at the trial of the ejectment suit. On the other hand, if these proceedings did transfer the legal title to plaintiffs, they were entitled to recover as they did in that action.

At the time that suit was commenced, the mortgagor, McClure, was vested with the title and was the proper and necessary defendant. Whether any other persons were proper defendants does not appear, nor is it material to inquire. But for the bankruptcy of McClure, there can be no doubt that the sale under the foreclosure decree and the deed of the master would have vested the title in the purchaser, and that this would have related back to the date of the mortgage. Nor can there be any question, that, the suit having been commenced against McClure when the title or equity of redemption (no difference which it is) was in him, any person who bought of him or took his title or any interest he had pending the suit, would have been bound by the proceedings and their rights foreclosed by the decree and sale. These are elementary principles. Is there anything in the Bankrupt Law, or in the nature of proceedings in bankruptcy, which takes the interest in the mortgaged property acquired by the assignee out of this rule?

There is certainly no express provision to that effect. It is maintained by counsel, that, because the assignee is vested by the assignment under the statute with the legal title, there remains nothing from that time for the decree of foreclosure to operate on, and it cannot thereafter have the effect of transferring the title which is in a party not before the court. But, if this be true in this case, it must be equally true in other suits in which the title is transferred *pendente lite*.

We have already said, and no authority is necessary to sustain the proposition, that a sale and conveyance by the mortgagor pending the suit would not prevent the court from proceeding with the case without the purchaser, nor affect the title of him who bought under the decree. So, in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the court. The obvious reason for this is, that if, when the jurisdiction of the court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to the litigation, and justice would be defeated by the number of these transfers. Another reason is, that when such a suit is ended by a final decree transferring the title, that title relates back to the date of the instrument on which the suit is based, or to the

commencement of the suit; and the court will not permit its judgment or decree to be rendered nugatory by intermediate conveyances.

We see no reason why the same principle should not apply to the transfer made by a bankruptcy proceeding. The Bankrupt Act expressly provides that the assignee may prosecute or defend all suits in which the bankrupt was a party at the time he was adjudged a bankrupt. If there was any reason for interposing, the assignee could have had himself substituted for the bankrupt, or made a defendant on petition. If he chose to let the suit proceed without such defense, he stands as any other person would on whom the title had fallen since the suit was commenced.

It is a mistake to suppose that the Bankrupt Law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the Act which sanctions such a proposition.

The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

It was the duty of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain, that if at any stage of the proceeding, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention, and received none. In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.

The debtor of a bankrupt, or the man who contests the right to real or personal property

See 1 OTTO.

U. S., Book 23.

with him, loses none of those rights by the bankruptcy of his adversary.

The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with and does not divest that of the state courts.

These propositions dispose of this case. They are supported by the following cases decided in this court: *Smith v. Mason*, 14 Wall., 419 [81 U. S., XX., 748]; *Marshall v. Knox*, 16 Wall., 551 [83 U. S., XXI., 481]; *Mays v. Fritton*, 20 Wall., 414 [87 U. S., XXII., 389]; *Doe v. Childress*, 21 Wall., 642 [88 U. S., XXII., 549]. See, also, *Johnson v. Bishop*, Woolw., 824.

They dispose of this case, the judgment in which is affirmed.

Cited—92 U. S., 182; 93 U. S., 134; 94 U. S., 737; 95 U. S., 59, 60; 103 U. S., 69; 104 U. S., 240, 574; 105 U. S., 469; 107 U. S., 633; 8 Ben., 467; 9 Ben., 430; 7 Biss., 212; 9 Biss., 443; 14 Blatchf., 209; 16 Blatchf., 41; 15 Bk. Reg., 50, 111, 380, 549; 16 Bk. Reg., 272, 386; 17 Bk. Reg., 91, 129; 18 Bk. Reg., 481, 494, 541; 4 Dill., 532; 1 McCrary, 141, 143; 31 N. J. Eq., 6, 7; 33 N. J. Eq., 572; 25 Minn., 505; 69 Mo., 630.

W. S. GILMAN ET AL., *Appts.*,

v.

THE ILLINOIS AND MISSISSIPPI TELEGRAPH COMPANY, AND THE DES MOINES VALLEY RAILROAD COMPANY ET AL.

v.

H. COYKENDALL, *Garnishee, Plff. in Err.*,

THE ILLINOIS AND MISSISSIPPI TELEGRAPH COMPANY.

(See S. C., 1 Otto, 603-617.)

Exceptions, when considered—mortgage by railroad company, effect of—income.

1. Where the proceeding was not according to the Act of Mar. 3, 1855, this court has no power to examine any ruling of the court below, which was accepted to during the progress of the trial.

2. A mortgage by a railroad company, of its road and its income, does not transfer the income to the mortgagee until he takes possession, where it is clearly implied in the mortgage that the railroad company should hold possession and receive the income until the mortgagee should take possession, or the proper judicial authority should interpose.

3. Until then, the whole income belonged to the company and was subject to its control, and it was liable to the creditors of the company as if the mortgage did not exist.

[Nos. 557, 558.]

Submitted Jan. 21, 1876. Decided Feb. 14, 1876.

NOTE.—*Right of mortgagor to income and products of mortgaged premises.*

A mortgagor in possession may lawfully dispose of the products of the land, subject only to the superior rights of the mortgagee. *Kimball v. Lewiston Steam Mill Co.*, 55 Me., 499.

A mortgagor, so long as he remains in possession, may take the rents and profits of the land to his own use and is not required to account to the mortgagee for them. *Mead v. Orrery*, 3 Atk., 244; *Syracuse City Bk. v. Tallman*, 31 Barb., 201; *In re Tallahassee Mfg. Co.*, 64 Ala., 567; *Scott v. Ware*, 65 Ala., 174; *Reeder v. Dargan*, 15 S. C., 175; *Young v.*

NO. 557. Appeal from the Circuit Court of the United States for the District of Iowa.

No. 558. In error to the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

The precise language of the granting clauses in the two mortgages in question, is as follows:

First Mortgage.

Now, therefore, in pursuance of the foregoing recited resolutions, and in order to secure the prompt and certain payment of the said bonds, the said party of the first part, in consideration of the premises, and in consideration of the sum of \$1 paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and transferred, and by these presents doth grant, bargain, sell, convey and transfer unto the said parties of the second part, all and singular the Keokuk, Fort Des Moines and Minnesota Railroad, now being made and constructed in the State of Iowa, and extending 154 miles or thereabouts, commencing at a point in the City of Keokuk, in the County of Lee, and State of Iowa, on the right bank of the Mississippi River, and extending thence along the valley of the Des Moines River, through the Counties of Lee, Van Buren, Wapello, Mahaska, Marion and Polk to Fort Des Moines, the capital of the State of Iowa, this grant being intended to include and convey the right of way, and all the lands occupied thereby, together with the superstructure and track thereon and to be put thereon, and all rails and materials used thereon or procured therefor, inclusive of the iron rails purchased and to be purchased or paid for with the above described bonds, or any of them, or with the proceeds of said bonds, or any of them; also, all and singular the bridges, viaducts, culverts, fences, stations, depot grounds, station-houses, depot buildings and erections, built or to be built, now held in the name of the said party of the first part, or hereafter to be acquired by them in connection with the said road, or in anywise thereunto appertaining; and also all and singular the locomotives, cars, tools, materials, machinery, contracts and all other property, real and personal, and all interests therein owned and held by the said party of the first part, in its corporate name or otherwise, or hereafter to be acquired by said party of the first part, in connection with the said railroad or otherwise, together with the tools, rents and profits to be had, gained or levied therefrom, and all franchises, rights and privileges of the said party of the first part, of, in, to or concerning the same.

To have and to hold all and singular the above-granted and described property and premises, and every part and parcel thereof, to the said Luther C. Clarke and Samuel R. Curtis, their survivor and successor and successors, in trust for the uses and purposes expressed in the foregoing recited resolutions, and subject to the provisions hereinafter contained.

Second Mortgage.

Now, therefore, the said Des Moines Valley Railroad Co., for and in consideration of the premises and of the sum of \$4,690,000, received to the full satisfaction of said trustees, and for the purpose and with the intent of securing the payment of all of said bonds, with the interest due and to grow due thereon, and to secure the payment to said trustees of said sinking fund.—

Hath granted, bargained, sold, conveyed, assigned, transferred and confirmed, and by these presents doth grant, bargain, sell, convey, assign, transfer and confirm, subject to the terms and conditions of said first mortgage to Clarke and Curtis, to said Gilman and Cowdrey, citizens of the City and State of New York, as trustees and in trust, and to the survivor and survivors of them, and to their successors or successor, the entire corporate property of the said Railway Company and all its franchises and privileges, constructed or to be hereafter constructed, now held and acquired, or to be hereafter constructed and acquired, extending from the present terminus of their line of railroad, in the City of Des Moines, through the Counties of Cope, Dallas, Boone, Green and Webster, to the Town of Fort Dodge.

And, also, subject to the lien creating and existing by reason of the mortgage or trust-deed above referred to, in favor of said Clarke and Curtis, the entire corporate property of said Railway Company, all its franchises and privileges constructed or to be hereafter constructed, now held and acquired or to be hereafter constructed and acquired, extending southerly from the City of Des Moines, through the Counties of Polk, Jasper, Marion, Mahaska, Wapello, Davis, Van Buren and Lee, to the Mississippi River at Keokuk.

Also, subject to said Clarke and Curtis mortgage, all the right of way and land occupied by said railroad and appurtenances thereto belonging, from Keokuk to Fort Dodge; and also, subject to said Clarke and Curtis mortgage, all the land acquired and appertaining, or which may hereafter be acquired and appropriated for station-houses, depots, engine-houses, storehouses, warehouses, machine-shops, workshops, super-

North., &c., Iron Co., 9 Biss., 305; Fitchburgh Mfg. Co. v. Melven, 15 Mass., 208; Moore v. Titman, 44 Ill., 367; Miss. Valley, &c., R. R. Co. v. U. S. Express Co., 81 Ill., 534; Anderson v. Strauss, 98 Ill., 485; Taliaferro v. Gay, 78 Ky., 496.

Parties may agree that future earnings shall be held by the lien of the mortgage. Party receiving income in such case holds it in trust for whoever in equity is entitled to it under the mortgage. Pullan v. Cin. & C. R. R. Co., 5 Biss., 237; Woolley v. Holt, 14 Bush., 788; Waltham v. Rives, 84 Ala., 96.

Mortgagor is not liable for rents and profits accruing between commencement of action to foreclose and time of taking possession of premises under the decree. White v. Wear, 4 Mo. App., 341; Wilder v. Houghton, 1 Pick., 87; Mayo v. Fletcher, 14 Pick., 526.

Mortgagee cannot before entry, for condition broken, maintain trespass *quare clausum fregit* against one who cuts and takes off the grass. Page

v. Robinson, 10 Cush., 99; Hewes v. Bickford, 49 Me., 71.

The purchaser at foreclosure sale is entitled to the crops growing at the time. He may maintain trespass against mortgagor or his lessee for taking them. Downard v. Groff, 40 Iowa, 597; Jones v. Thomas, 8 Blackf., 428; Lane v. King, 8 Wend., 564; Fernald v. Linscott, 6 Me., 234; Scriven v. Moots, 36 Barb., 64.

If the crop is expressly excepted from mortgage, it will not pass to purchaser on foreclosure. Sherman v. Willett, 42 N. Y., 146.

As between mortgagor and mortgagee, the latter, by foreclosure and sale, becomes entitled to the possession of the premises and to all the crops growing on them. Lane v. King, 8 Wend., 564; S. C., 24 Am. Dec., 105; Shepard v. Philbrick, 2 Denio, 174; Downard v. Groff, 40 Iowa, 597; Jones v. Thomas, 8 Blackf., 428; Brown v. Thurston, 56 Me., 125; Gilman v. Willa, 66 Me., 273.

structures, erections and fixtures, together with all the appurtenances, rights and privileges thereunto belonging at any and all points on said road, from and including Keokuk and Fort Dodge.

And, also, subject to said Clarke and Curtis mortgage all and singular the locomotives, tenders, passenger cars, freight cars and every and all other cars, carriages, tools, machinery, wood, coal and fuel and equipments for said railway, and now owned or which shall hereafter be owned or acquired by said Company; and also all goods and chattels, wood, fuel, oil or supplies now owned or which shall hereafter be owned by said Company, and in any way relating or appertaining or belonging to or connected with said railway, or the running or operating the same. And also all rents, issues, income, tolls, profits, currency, moneys, rights, benefits and advantages, derived or to be derived, had or received therefrom by said Company in any way whatsoever. And also, free and clear from all incumbrances, all the lands which may have been or which shall hereafter be donated or granted by, or in any other manner acquired from the United States, or from or through the State of Iowa, to aid in building the railroad of this Company, or any part of it; and such lands not required for use by the railroad for their traffic, to which this Company are or shall hereafter be entitled, shall be specially set aside and appropriated to the purposes of this mortgage, together with all and singular the emoluments, income and advantages, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, claim and demand whatsoever, in law or in equity, of the said parties of the first part, of, in and to the same, and each and every part and parcel thereof, with the appurtenances.

It is agreed by and between the parties hereto, that said Clarke and Curtis mortgage is limited, so far as the same is a lien upon the income of said Railroad Company, to the income derived from that part of said railroad extending from Keokuk to Des Moines, and so far as it is a lien upon the equipment and supplies of said railroad, to such *pro rata* of said equipment and supplies as the whole length of said railroad now constructed, or hereafter to be constructed, bears to the distance from Keokuk to Des Moines; and that said Clarke and Curtis mortgage is not a lien in any manner or form upon the railroad or any of its appurtenances hereafter acquired, constructed or built from the present terminus of said railroad in Des Moines northerly or westerly.

In the event of said Company extending their railroad northerly to the Minnesota State Line, or to any intermediate point, then they reserve from this mortgage such *pro rata* of the income, equipment and supplies of said railroad as the length in miles of new extensions bear to the distances in miles from Keokuk to Fort Dodge.

To have and to hold the above granted and bargained premises, with the appurtenances thereof, unto the said trustees, and to the survivors and survivor of them, and to their and his successor and successors and their and his assigns, in trust and upon the trust, uses and

purposes hereinafter expressed, of and concerning the same, for the use and benefit of the person or persons, firm or firms, bodies politic or corporate, who shall hereafter at any time become the purchasers or holders, owners or bearers, of any or either of said bonds, subject to the terms, provisions and stipulations in said bonds contained, and also subject to the possession and management of said railroad and property by said Company, and its successors and assigns, so long as no default shall be made in the payment of either interest or principal of said bonds, or in any or either of them, or in payment of the amount of money, as is herein provided for the sinking fund, and so long as the said Company shall well and truly observe, keep and perform all and singular the covenants, agreements, conditions and stipulations in said bond and in this indenture contained and set forth, and which are to be observed, kept and performed by and on the part of said Company.

Messrs. George G. Wright and Wm. M. Evarts, for appellants and plaintiff in error:

Said Railroad Company had legal capacity to and, by each of said mortgages, did mortgage its future earnings.

Act, Mar. 31, 1858, Rev. 1860, p. 222; *Pennock v. Coe*, 28 How., 117 (64 U. S., XVI., 436); *Jessup v. Bridge*, 11 Ia., 578; *Dunham v. Iselt*, 15 Ia., 284; 2 Redf. Railw., 455; *R. R. Co. v. Cowdrey*, 11 Wall., 459 (78 U. S., XX., 199).

In maintaining this the Company having power to mortgage its earnings, such earnings, when so mortgaged, became as much part of the bond holder's security as did the road-bed, rolling stock, or any other part of the mortgaged property. As to such of the earnings as had accrued before the foreclosure suit was commenced, they were either paid directly to the bond holders or applied, in aid of their securities, to the payment of operating expenses, etc. As to so much thereof as accrued after its commencement and before the sale, it was neither necessary nor practicable for plaintiffs to ask or take any special order with respect thereto. We can think of no order that could properly have been asked for or taken, unless it had been an order for the appointment of a receiver. Under section 2217, Rev. of Iowa, 1860, in the absence of stipulations to the contrary, the mortgagor of real property retains the legal property and right of possession. It is questionable whether, under this provision, an order appointing a receiver to take possession of the road could legally have been made, and, in any event, we think it very clear that no such order would or should have been made without time, showing that it was necessary for the proper application of the earnings; and it does not appear that any such necessity existed. So long as the earnings of the road were faithfully and properly applied in accordance with the right and interests of the bond holder, by the officers of the Company, there was certainly no occasion on their part for asking the appointment of a receiver or any other order whatever with respect to their collection, safe-keeping or application. It was, doubtless, to the interest of the bond holder that the earnings should be thereafter, until the sale of the road, as they had theretofore been applied, as far as necessary for that purpose to defray operating expenses. If this, or any other application of them in accordance

with their interests could as well and certainly be made without as with a receiver, the bond holders certainly should be in no manner prejudiced by their failure to have a receiver appointed.

Riley v. McCord, 21 Mo., 285; *Iowa v. Lake*, 17 Ia., 215.

If it be true generally, that a mortgaged lien is merged in a foreclosure decree, it will, in exceptional cases, be kept alive for reasons similar to those that operate to prevent merger in other similar cases. It is familiar law, that, although ordinarily when the mortgaged interest and the equity of redemption unite in the same person, the former will become merged in the latter; yet, when the interest of the common owner requires that they shall remain distinct and separate, such will be presumed to have been his intention and the lien of the mortgage will be kept alive for the purpose and to the extent of upholding such interest.

We can see no reason why the same rule, for the same reason, shall not be held to apply in favor of the bond holder in the case at bar, to the extent of keeping alive the mortgage lien as to the item of earnings, to whatever extent their interest requires.

If it be true that, by a foreclosure, the mortgage lien becomes merged in that of the judgment, it can only be true to the extent that the mortgaged property is, by the proceedings and terms of the decree, sought to be subjected to the payment of the mortgage indebtedness.

In case of a mortgage of productive property conveying the fee, upon the concurrent circumstances of insolvency of the mortgage debt, and the insufficiency of the fee to satisfy the principal debt and the accumulating interest and costs, the court of chancery finds a ground for a special equity to lay hold of the writs in aid of the failing security of the fee. This equity springs into existence from these extraneous facts, and dates from the judgment of the court thereon. Necessarily, therefore, all competing liens antedating this judgment of the court, legal or equitable, must be respected and maintained in their priority. But when the right of the mortgagee springs from his contract, and dates from the default of the mortgagor for its actionable completeness, no competing lien will be respected and upheld by the court of equity, which does not antedate the mortgagor's default in its asserted priority. If the competing lien be asserted by process of a common law court, the court of chancery appealed to for relief rescues the property from its sequestration, because the perfect equitable lien of the contract of the mortgage has rested on the property from the date of default in the debtor, and so the legal process has been anticipated by the equitable lien.

R. R. Co. v. Menzies, 26 Ill., 121.

Again; it cannot be doubted that if the debtor recognized this equitable lien, and administered the income and earnings of the road in obedience to it, paying thereout the running expenses, and applying the surplus on the mortgage debt, the mortgagee has no occasion to disturb the possession of the mortgagor, by the interposition of a receivership to accomplish the result. No doubt the mortgagee may, by want of vigilance, suffer the incomes and earnings to slip away irrevocably from his equitable lien and, by intervening through the powers of a court of equity,

can only secure the proper application of the future income or earnings. Whether this will happen or not, will depend wholly on the state of things when he intervenes. If he is in season to intercept the income and earnings before they have been collected or expended, as between himself and the debtor, he is in time. If the interference comes from a creditor of the mortgagor, the like rule applies. If the mortgagee intervenes in time to arrest by equitable process, the diversion of the income and earnings from under his equitable lien, in point of fact, his intervention is seasonable in point of law.

Now, as this bill was filed in a court of equity, against the Railroad Company and the judgment creditor, in time to arrest the diversion of the income and earnings of the road from under their subjection to the plaintiff's equitable lien, what is the answer of the judgment creditor to the relief to which the plaintiffs are, upon the foregoing principles, plainly entitled? Is any defect in the plaintiffs' equitable lien under the contract, or in their title to enforce it by appropriate suit, pointed out? By no means. Is there any pretense that the stage of their intervention is not seasonable, so as to arrest the attempted legal sequestration before the creditor has acquired his money? On the contrary, the bill was found immediately after the process of garnishment was served, and before a dollar was collected, or any adjudication charging a garnishee was made.

Messrs. J. Scott Richman and J. D. Caton, for appellees and defendant in error:

The first point made by appellants is, that the Railroad Company had legal capacity to and did mortgage its future earnings.

It is not questioned that it undertook to do so, and we do not find it necessary to question that such a mortgage might have been made and might have been effective. But when the first mortgage was given, there was no law in this State authorizing railroad companies to execute such mortgages.

It does not appear, however, that either of said mortgages were ever recorded at all, and certain it is that they were never recorded as chattel mortgages.

Ch. 93 of Revision of 1860, p. 388; *Murdock v. Gifford*, 18 N. Y., 28; *Hoyle v. R. R. Co.*, 54 N. Y., 314.

The earnings of the road were included in the mortgages, and if the appellants had claimed them in a proper manner and at a proper time they, doubtless, could have secured them. But unless they claimed them or demanded them in a legal manner, they certainly not only might lose them but have lost them; and if there has been a final decree, foreclosing the mortgages, they are merged or extinguished.

It is agreed on all hands that there was a decree of foreclosure; and one of the questions in the case is, as to the effect of a decree foreclosing a mortgage.

In this case the mortgagor was left in the possession of the property, and was left in the receipt of the earnings of the road, and could apply them in payment of its debts.

Curtis v. Millard, 14 Ia., 128; *Newman v. Delorimer*, 19 Ia., 244.

A mortgage is simply a security. It follows the fate of the principal, and is dependent upon

it entirely for vitality. The mortgage follows the fate of the debt as certainly and surely when the debt is merged in a decree founded upon the mortgage, as it does when the debt is barred by the Statute of Limitations.

A mortgage being nothing more than a security for a debt, why should it be exalted above the debt itself?

Bertram v. Waterman, 18 Ia., 529; *Goodrich v. Dunbar*, 17 Barb., 644; *Green v. Sarmiento*, 1 Pet. C. C., 74; *Butler v. Miller*, 1 Den., 407; *Curson v. Monteiro*, 2 Johns., 808; *U. S. v. Price*, 9 How., 88; *Willings v. Consequa*, 1 Pet. C. C., 172; *Ward v. Johnson*, 18 Mass., 148; *Robertson v. Smith*, 18 Johns., 459; *Eldred v. Bank*, 17 Wall., 545 (84 U. S., XXI., 685); *Mason v. Eldred*, 6 Wall., 281 (78 U. S., XVIII., 783); *Jones v. Johnson*, 8 Watts & S., 276; *The People v. Beebe*, 1 Barb., 388; *Ayers v. Cayce*, 10 Tex., 90.

Mr. Justice Swayne delivered the opinion of the court:

These cases have been argued together, and will be decided together. The case at law will be first considered.

On the 24th of May, 1872, the Telegraph Company recovered in the Circuit Court of the United States for the District of Iowa a judgment for the sum of \$23,734.04 and costs. On the 18th of June following, execution was issued. On the 17th of that month, the marshal to whom the process was directed served it by attaching as garnishees several persons, one of whom was Coykendall, the plaintiff in error. On the 27th of October, 1873, he filed his answer; and on the 27th of October, 1874, he filed a further answer.

By the first answer he admitted that, since he was garnished, he had received for and paid over to the Railroad Company more than \$37,000. In his second answer he set forth that he was the agent of the Railroad Company at Des Moines; and that his duties were to sell tickets and receive and ship freight, and to receive the charges upon such freight. For the moneys received both for tickets and freight a large proportion belonged to other companies, but how much he did not know. All the moneys he received were regularly transmitted to the assistant treasurer of the Des Moines Company.

The proper apportionment of the moneys was made by the officers of that company at Keokuk, and the Des Moines Company was accountable to the other companies for what belonged to them. He was not in the employment of any other company or person during the time mentioned, and was not responsible to any other company or person for the moneys which he received, as before stated.

The gross amount received by him, between the time he was garnished and the appointment of the receiver who took possession of the road, was \$27,000.

The case was submitted to the court, and argued by the counsel upon both sides. The next day it was stated to the court by the counsel for the defendant that proof could be adduced of the proportion of the moneys in question which belonged to other companies, and time was asked to procure it. The application was overruled, and the court gave judgment for \$27,000 and costs. The garnishee thereupon

excepted to the ruling of the court refusing further time.

The case having been submitted to the court and argued by the counsel of both parties, the garnishee not asking for a jury, the record in this respect shows no error. It is to be taken that both parties waived a trial by jury, and they are bound accordingly. *Phillips v. Preston*, 5 How., 278; *Campbell v. Boyreau*, 21 How., 224 [62 U. S., XVI., 96]; *Kelsey v. Forsyth*, 21 How., 86 [62 U. S., XVI., 82]. The proceeding not having been according to the Act of March 3, 1865, 18 Stat. at L., 501, this court has no power to examine any ruling of the court below excepted to during the progress of the trial. *Campbell v. Boyreau* [*supra*]; *Guild v. Frontin*, 18 How., 135 [59 U. S., XV., 290]; *Kearney v. Case*, 12 Wall., 275 [79 U. S., XX., 395]; *Dickinson v. Bk.*, 16 Wall., 250 [83 U. S., XXI., 278]. The only point attempted to be presented by the bill of exceptions was the refusal of the court to give time for the production of further evidence. If this subject was before us in such a shape that we could consider it, it would be a conclusive answer that the matter was one resting in the discretion of the court. Its determination, therefore, could not be reviewed by this tribunal. *The judgment of the circuit court is affirmed.*

This brings us to the examination of the case in equity.

The bill was filed to prevent, by injunction, the collection of the moneys upon which the judgment in favor of the Telegraph Company was founded. There is no controversy between the parties as to the facts.

On the 16th of February, 1857, the Railroad Company, by its then corporate name, executed a mortgage; and on the 1st of October, 1868, by its corporate name as altered, executed another. Both were given to secure the payment of its bonds as set forth. A part of the premises described and pledged by both mortgages, besides the road, was its income.

In case of default in the payment of interest or principal, the mortgagees were authorized to take possession and collect and receive the income and earnings of the road and apply them to the debts secured and, upon the request of one third of the bond holders, to sell the mortgaged premises.

The conditions of both mortgages having been broken, the mortgagees in the second mortgage filed their bill of foreclosure in the Circuit Court of Polk County, in the State of Iowa. The mortgagees in the second mortgage, various judgment and lien creditors, among the former the Telegraph Company, were made defendants. On the 31st of May, 1873, a decree of foreclosure and sale was rendered. It fixed the priorities of the several parties, and held that the judgment of the Telegraph Company was a lien subject to the mortgage in suit and other specified liens. It ordered a sale of the mortgaged property. The road was still in possession of the Company. The decree made no provision for disturbing their possession, and none whatever as to the income of the road between the time of the decree and the time of the sale. The Telegraph Company proceeded, as we have stated, in disposing of the case at law. On the 20th of June, 1873, the appellants, who are the trustees in the two mortgages, filed this bill. On

the 9th of September, 1873, after the sheriff had advertised the mortgaged premises for sale, the decree in the state court was amended by providing for the appointment of "a special receiver of all the income and earnings of the road" between the date of the decree and the time fixed by the sheriff for the sale to be made by him. This was done with a saving of the rights of the Telegraph Company. The special receiver took possession on the 15th of September, 1873. The sale by the sheriff was made on the 17th of October, 1873. The road was operated by the Company up to the time when the receiver took possession.

During this period, the fund was received for which judgment was given against Coykendall.

The proceedings in the case at law having been held valid, the Telegraph Company is entitled to the fund in controversy, unless the appellants have shown a better right to it. The question arises upon the mortgages. The civil law is the spring-head of the English jurisprudence upon the subject of these securities. Originally, according to that jurisprudence, mortgages of the class to which those here in question belong vested the fee, subject to be divested by the discharge of the debt at the day limited for its payment. If default was then made, the premises were finally lost to the debtor. In the progress of time more liberal views prevailed, and the debt came to be considered as the principal thing and the mortgage only as an incident and security. In the present state of the law, where there is no prohibition by statute, it is competent for the mortgagee to pursue three remedies at the same time. He may sue on the note or obligation, he may bring an action of ejectment, and he may file a bill for foreclosure and sale. 1 Hill. Mortg., 9, 62, 104, 111; *Andrews v. Scotton*, 2 Bland, 665.

The remedy last mentioned was resorted to in the state court by the mortgagees in the second mortgage, those in the first having been made parties, and that mortgage thus brought before the court. That court, therefore, had full jurisdiction as to the rights of all the parties touching both instruments. It would have been competent for the court *in limine*, upon a proper showing, to appoint a receiver, and clothe him with the duty of taking charge of the road and receiving its earnings with such limit of time as it might see fit to prescribe. It might have done the same thing subsequently, during the progress of the suit. When the final decree was made, a receiver might have been appointed, and required to receive all the income and earnings until the sale was made and confirmed, and possession delivered over to the vendee.

Nothing of this kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the meantime. It follows that neither, during that period, was in anywise affected by the action of the court.

They were as if the decree were not.

As regards the point under consideration, the decree may, therefore, be laid out of view.

The stipulation renders it unnecessary to consider the amendment to the decree.

Without that stipulation, the result would have been the same. It could not affect rights which had attached before it was made.

Nothing was done in the exercise of the right which the mortgages gave to the mortgagees to intervene and take possession. We may, therefore, lay out of view also both these topics.

This leaves nothing to be examined but the effect of the mortgages, irrespective of any other consideration.

A mortgagor of real estate is not liable for rent while in possession. 2 Kent, Com., 172. He contracts to pay interest, and not rent. In *Chinnery v. Blackman*, 8 Doug., 391, the mortgagor of a ship sued for freight earned after the mortgage was given, but unpaid. Lord Mansfield said: "Until the mortgagee takes possession, the mortgagor is owner to all the world, and is entitled to all the profit made." It is clearly implied in these mortgages that the Railroad Company should hold possession and receive the earnings until the mortgagees should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated, and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the Company. The same discretion extended to the surplus. It was for the Company to decide what should be done with it. In this condition of things, the whole fund belonged to the Company and was subject to its control. It was, therefore, liable to the creditors of the Company as if the mortgages did not exist. They in nowise affected it. If the mortgagees were not satisfied, they had the remedy in their own hands, and could at any moment invoke the aid of the law, or interpose themselves without it. They did neither.

In *R. R. Co. v. Cowdrey*, 11 Wall., 459 [78 U. S., XX., 199], substantially the same question arose as that we are considering. The mortgage there contained provisions touching the income of the road similar to those in the mortgages before us.

This court held that, at least until after a regular demand was made, those who received the earnings were not bound to account for them. See, also, *Bath v. Miller*, 51 Me., 841; *Noyes v. Rich*, 52 Me., 115.

Upon both reason and authority, we think the appellants have no right to the fund in controversy.

The decree of the Circuit Court is affirmed.

Cited—94 U. S., 800; 99 U. S., 253; 103 U. S., 623; 111 U. S., 250; 9 Blas., 305; 4 Hughes, 373; 1 McCrary, 392; 24 Minn., 457.

WILLIAM C. LOBENSTEIN, Appt.,

v.

UNITED STATES.

(See S. C., 1 Otto, 324-330.)

Construction of government contract.

Where, by contract with the Government, one was to have all the hides of cattle slaughtered for Indians at Camp Supply and Fort Bill, for a certain

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time, which the Superintendent of Indian Affairs should decide, were not required for the Indians, the number being estimated, and no cattle were there slaughtered by any person acting under the authority of the United States, but they were given out to the Indians by whom they were killed, and consequently no hides could be delivered under the contract, the contractor was not entitled to recover any damages for expenses paid by him in preparation to perform the contract, because there was no breach of the contract by the U. S.

[No. 143.]

Argued Feb. 10, 1876. Decided Feb. 21, 1876.

APPEAL from the Court of Claims.

In the year 1869, an arrangement was entered into between the Department of the Interior and the Department of War, for the supply, through the Subsistence Department of the Army, of beef cattle to the Indians, in pursuance of the 4th section of the Act of April 10, 1869. 16 Stat. at L., 18, 40.

By that arrangement the Department of War undertook to supply, through its Subsistence Department, such cattle as should be needed for Indians in the vicinity of Camp Supply and Fort Sill; and in reference thereto, as well as to other matters, the Commissary-General of Subsistence of the Army, May 26, 1869, gave written instructions to Brevet Major-General H. F. Clarke, Assistant Commissary-General of Subsistence in the Military Division of the Missouri; which instructions, in connection with the matter of furnishing said cattle, contained the following words:

"The cattle should be by contract, if possible, delivered by the contractors monthly or weekly, and when received, actually weighed upon the scales, to be transferred to the agents on foot; the Indians to have the benefit of the fifth quarter extra. The hides to be preserved and saved for sale when practicable."

General M. R. Morgan, Chief Commissary of Subsistence of the Military Department of the Missouri, stationed at Fort Leavenworth, Kansas, was charged with the supervision of the subsistence of the Indians on the Southern Reservation, which included those to be supplied from Camp Supply and Fort Sill; and the aforesaid instructions to General Clarke were transmitted to him for his guidance.

Supposing himself thereto authorized by the above-quoted words of said instructions, the said Morgan entered into the two written contracts with the claimant sued on.

The material part of each of the contracts was as follows:

That the said party of the second part shall have all the hides of beef cattle slaughtered for Indians at Fort Sill, Indian Territory, up to and including June 30, 1870, which the Superintendent of Indian Affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about 4,000, more or less.

That the said party of the second part shall have all the hides of the beef cattle slaughtered for Indians at Camp Supply, Indian Territory, up to and including June 30, 1870, which the Superintendent of Indian Affairs at that place shall decide are not required for the comfort of the Indians; the number of the hides to be about 2,000, more or less.

In September, 1869, the Commissioner of Indian Affairs directed that the cattle should all be turned over on the hoof, to the Indian agent, See 1 OTTO.

which was done; and they gave them out from time to time to the Indians, by whom they were killed and cut up; and no cattle were slaughtered for the Indians at Fort Sill or at Camp Supply by anyone acting under the authority of the United States; and the claimant obtained no hides of cattle furnished to the Indians at either of those posts during the period of time covered by the said contracts.

The claimant fully prepared himself to carry out and perform said contracts on his part, incurring necessary expenses of \$1,256.75.

If the hides had been delivered to the claimant's agents at Fort Sill and Camp Supply, they could have been sent thence to Leavenworth, Kan., by trains returning thither, after having taken out supplies to military posts. At Leavenworth they would have been worth 21 and 22 cents per pound; which, after paying the price stipulated in said contracts, and the expense of agents and of transportation to that place, would have yielded the claimant a profit.

Mr. C. F. Peck, for appellant:

It is objected that the contract was for the sale of the hides of cattle slaughtered for the Indians, and that, inasmuch as the government officers or *employés* did not slaughter any of the cattle, but the agent turned them over on foot to the Indians, there was nothing for the contract to operate upon.

Contracts are to be construed according to the intention of the parties, as gathered from the expressions used and from the surrounding facts and circumstances to which these expressions must be applied. The facts were, that the Government was about supplying several thousand head of cattle for feeding the Indians. It was wholly within the discretion of the agents of the Government, whether these should be delivered to the Indians on the hoof or as slaughtered beef.

The expression, "The number of hides to be about 4,000, more or less," manifests plainly that General Morgan and Mr. Lobenstein both supposed and intended that about so many hides would be delivered; and the other expressions show that they supposed and intended that the cattle should be slaughtered for and not by the Indians.

Good faith and honest dealing forbid that such evasions should defeat a contract fairly entered into.

Day v. Fynn, Owen, 183; *Quesnel v. Woodlief*, cited in 2 Hen. & Munf., 178 n.; *Nelson v. Matthews*, 2 Hen. & Munf., 178; *Smith v. Evans*, 6 Binn., 113; *Cross v. Elgin*, 2 B. & Ad., 106.

Mr. Edwin B. Smith, Asst. Atty-Gen., for appellee:

The claimant, in any event, was only to have such hides as the Superintendent of Indian Affairs should decide were not required for the comfort of the Indians.

This decision was a condition precedent to his becoming entitled to any hides; and it makes no difference whether that official never made any decision, or decided that all the hides were required by the Indians for their comfort. In either case, the claimant cannot recover.

Thurnell v. Balbirnie, 2 Mees. & W., 786; *Worsley v. Wood*, 6 T. R., 710; *Milner v. Field*, 5 Exch., 829; *Morgan v. Birnes*, 9 Bing., 672; *Cook v. Jennings*, 7 T. R., 384; *Moakley v. Riggs*, 19 Johns., 69; *Taylor v. Bullen*, 6 Cow., 624.

The contract was subject to the superintendent's arbitration upon the point of what was required for the comfort of the Indians; if he declined to arbitrate or decided adversely to the claimant's having any hides, the result would be the same. In either contingency, the contract was at an end. Cases cited *supra*; *Palmer v. Clark*, 106 Mass., 389; *Flint v. Gibson*, 106 Mass., 391; *Grafton v. Eastern Cos. Ry. Co.*, 8 Exch., 699.

Mr. Chief Justice Waite delivered the opinion of the court:

We agree entirely with the Court of Claims in its construction of the contracts sued upon in this case. By one contract, Lobenstein was to have "All the hides of beef cattle slaughtered for Indians at Camp Supply, * * * up to and including June 30, 1870, which the Superintendent of Indian Affairs at that place shall decide are not required for the comfort of the Indians; the number of hides to be about 2,000, more or less." The other contract is similar in its terms for the hides of cattle slaughtered for Indians at Fort Sill, the number to be about 4,000, more or less.

The Commissioner of Indian Affairs directed that all the cattle should be turned over to the Indian agent, on foot; and this was done. None were slaughtered by any person acting under the authority of the United States; but they were all given out from time to time to the Indians, by whom they were killed. Consequently, no hides could be delivered under the contracts.

There was no obligation on the part of the United States to slaughter the cattle or any portion of them for the Indians; and they were only bound to deliver the hides of such as they did slaughter, in case the Commissioner of Indian Affairs did not decide that they were required for the comfort of the Indians. If he decided that all were required by the Indians, that excused the United States from delivery to Lobenstein. He did, in effect, so decide when the Commissioner directed that the cattle should all be delivered on foot. Lobenstein took this risk when he entered into the contracts, and he undoubtedly made his calculations of profits in case of success accordingly. The best evidence of this is to be found in the fact that he claims in this action to recover more than \$15,000 for alleged loss of profits, while he has actually expended in preparation to meet his obligations only \$1,256.75.

The estimate of the number of hides as made in the contracts does not create an obligation on the part of the United States to deliver that number. That estimate was undoubtedly intended as a representation of the probable number of cattle that would be delivered to the Indians. In point of fact, the number actually delivered was very much less. Neither party could determine how many would be reserved by the Commissioner for the use of the Indians. Therefore, necessarily, when the contract was made, the number specified could not have been understood to be a guaranteed number. If that number or its approximation was not guaranteed, none was. It follows as a consequence that this claimant has no right of action. He took his risk, and insured himself in his anticipated large profits if his venture proved a success.

The judgment of the Court of Claims is affirmed.

WILLIAM A. STONE, *Appt.*,

v.

EZRA B. TOWNE, Admr. of ROBERT W. BURNEY, Deceased; AMANDA McDONOUGH and her Husband, JOHN McDONOUGH, LEILLA FELT and her Husband, ALBERT T. FELT ET AL.

(See S. C., 1 Otto, 341, 342.)

Cloud on title—improper parties.

Complainants who are not parties to a judgment, who are not in any sense bound by it, and who cannot be made liable for it *in personam*, cannot sustain a bill to set aside the judgment, which is of itself no lien on their property.

[No. 142.]

Argued Feb. 10, 1876. Decided Feb. 21, 1876.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Messrs. Wright & Lowe, for appellant.

Mr. Jos. Casey, for appellees.

Mr. Justice Miller delivered the opinion of the court:

On the first day of November, 1857, Oliver O. Woodman made his four promissory notes, payable to his own order, at the office of Brown, Johnson & Co., New Orleans, and indorsed them in blank, and delivered them to said Brown, Johnson & Co. Three of the notes were for \$3,000 each, and one for \$2,761.15; and they fell due at various periods within five months. They were given for a pre-existing indebtedness of Woodman to Brown, Johnson & Co.; and were secured by a mortgage on the cotton farm of Woodman, in Louisiana. None of these notes were paid at maturity. On the 26th day of May, 1869, William A. Stone, the appellant in this case, brought a suit in the Circuit Court of the United States for the Southern District of Mississippi against Ivory Woodman, as administrator with the will annexed of Oliver O. Woodman, on these notes; and the administrator thereupon confessed a judgment in his favor for the amount of the notes with interest—to wit: \$21,868.85.

The suit now before us is a bill in chancery, brought by appellees to set aside this judgment as obtained by fraud. These appellees are citizens of the State of Louisiana, and are the heirs of Robert W. Burney; and the ground on which they seek to interpose in this matter is, that Stone is trying to subject the lands of Woodman to the payment of this judgment, which lands they claim had in the lifetime of their ancestor, R. W. Burney, been conveyed to him and, after his death, had descended to them.

The judgment which is assailed is not a lien on this land, since it is rendered in Mississippi, and the land is in Louisiana. It does not bind any of the complainants personally, for they are not parties to it in any way; nor does it bind the administrator or executor of Burney, for the same reason. It is simply a judgment in the State of Mississippi, in the Federal Court,

against the administrator of Woodman's will.

It is very difficult to see on what principle the complainants, who were not parties to that judgment, who are not in any sense bound by it and who cannot be made liable for it *in personam*, can sustain a bill to set aside the judgment, which is of itself no lien on their property and is in its terms binding only on the administrator of Woodman's will.

The petition in the suit of Stone to enforce this judgment against the estate of Woodman in Louisiana, which is made part of the bill, does not rely upon the mortgage, but upon the fact that the real estate of which Woodman died seised was never really sold or conveyed to Burney; that his heirs have no title to it; that it is still a part of Woodman's succession, and, for that reason, liable, in the hands of the administrator, to the payment of this judgment. Every defense which the heirs of Burney can rightfully make to this petition is open to them. If what it charges is untrue, they can defend against it successfully; if it is true, the property ought to be restored to the succession of Woodman, without regard to the validity of the judgment. That is a matter between the administrator of Woodman or his heirs, and the judgment plaintiff, Stone, in which the heirs of Burney can have no legal interest. If they have such an interest, they can set it up in the Louisiana suit, so far at least as may be necessary to protect their rights, and beyond this they have no right to interfere.

On this ground, we are satisfied that the decree must be reversed and the bill dismissed; and it is so ordered.

JAMES M. TOWNSEND, *Appt.*,

v.

ALFRED TODD AND PHILANDO ARMSTRONG, Assignees of GEORGE T. NEWHALL, a Bankrupt.

(See S. C., 1 Otto, 452-454.)

State decisions, when followed—mortgage.

1. This court is bound to follow the decisions of the courts of the State, in their construction of the Recording Acts of the State, if there has been a uniform course of decision respecting them.

2. In Connecticut, a mortgage must truly describe the debt intended to be secured.

[No. 664.]

Submitted Jan. 17, 1876. Decided Feb. 21, 1876.

A PPEAL from the Circuit Court of the United States for the District of Connecticut.

This case arose upon a bill in equity, filed originally in the District Court of the United States for the District of Connecticut, by the

NOTE.—Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with state constitution; to review decrees of state courts as to construction of state laws. Power of state courts to construe their own statutes. See note to Jackson v. Lamphire, 25 U. S. (8 Pet.), 280.

It is for state courts to construe their own statutes; Supreme Court will not review their decisions except when specially authorized to by law. See note to Commercial Bk. v. Buckingham, 46 U. S. (5 How.), 317.

In what instances U. S. Courts do not follow state decisions? See note to U. S. v. Muscatine, 75 U. S., XIX., 484.

See 1 Otto.

assignees in bankruptcy of George T. Newhall, who had been previously adjudicated a bankrupt by that court, to set aside a note and mortgage for \$50,000, executed by the bankrupt in favor of the defendant. The case is stated by the court.

Mr. John S. Beach, for appellant.

Mr. Simeon E. Baldwin, for appellees.

Mr. Justice Hunt delivered the opinion of the court:

The validity of the mortgage of \$50,000 is attacked on the ground that it is in violation of the spirit and policy of the statutes and recording system of the State of Connecticut. The district and the circuit judge, each familiar with the statutes and decisions of that State, sustained this proposition. The precise objection to the mortgage is, that it does not truly describe the debt intended to be secured. The mortgage by its terms was given to secure the payment of a note of \$50,000, dated April 12, 1873, executed by George T. Newhall to the order of James M. Townsend, payable on demand, with interest at the rate of 7 per cent., payable semi-annually in advance. The bill alleges, and it is found by the district judge to be true, that Newhall was not at the date of the mortgage, and when the same was recorded, indebted to Townsend in any sum whatever which was secured by said note. The understanding was that Townsend would endeavor to borrow money or available securities to furnish to Newhall's creditors in satisfaction of his debts; and the mortgage was to stand as security for the repayment of the values thus advanced. The mortgage and note were to be placed in the hands of one White; and, if Townsend was unable to render this pecuniary aid, the sum of \$40,000 was to be indorsed upon the note and mortgage by White, and the mortgage was to stand as security for the Chapman mortgage of \$7,500, and a debt of \$2,500 due to Townsend, also secured by another mortgage. Townsend did not obtain or borrow money or securities from any third person on the faith of this mortgage; but, in reliance upon the security of the mortgage, he did indorse notes for Newhall, and pay money to an amount exceeding \$6,000. The struggle on the part of Townsend is to hold his mortgage for this sum of \$6,000.

The question depends upon the recording Acts of the State of Connecticut; and we are bound to follow the decisions of the courts of the State in their construction of those Acts, if there has been a uniform course of decisions respecting them. *Allen v. Massey*, 17 Wall., 351 [84 U. S., XXI., 542]; *Swift v. Tyson*, 16 Pet., 1; *Chicago v. Robbins*, 2 Black, 426 [67 U. S., XVII., 304].

The cases of *Pettibone v. Griswold*, 4 Conn., 158; *Shepard v. Shepard*, 6 Conn., 87; *North v. Belden*, 18 Conn., 383; *Hart v. Chalker*, 14 Conn., 77; *Merrills v. Swift*, 18 Conn., 257; *Bacon v. Brown*, 19 Conn., 80, and several others are clear and decisive against the validity of the mortgage in question. In *Mix v. Coles*, 20 Conn., 420, and *Potter v. Holden*, 81 Conn., 385, the Supreme Court of that State held to its principles in words, but in effect considerably relaxed the rule. If those cases stood alone or if there was no later case there

would be some room for doubt what the rule should be. The very recent case, however, of *Bramhall v. Flood*, 41 Conn., 72, fully and distinctly re-asserts the rule laid down in the earlier cases. It is there held that the mortgage must truly describe the debt intended to be secured, and that it is not sufficient that the debt be of such a character that it might have been secured by the mortgage had it been truly described.

In most of the States, a mortgage like the one before us, reciting a specific indebtedness, but given in fact to secure advances or indorsements thereafter to be made, is a valid security, and would be good to secure the \$6,000 actually advanced before other incumbrances were placed upon the property. *Hurd v. Robinson*, 11 Ohio St., 232; *Gill v. Pinney*, 12 Ohio St., 88; *Ryan v. Dox*, 84 N. Y., 807; *Bk. v. Howard*, 35 N. Y., 500; *Robinson v. Williams*, 22 N. Y., 380; *Craig v. Tappan*, 2 Sandf. Ch., 78; *Townsend v. Empire S. D. Co.*, 6 Duer, 208.

We should be quite willing to give the appellant the benefit of this principle to the extent of his actual advances; but the contrary rule seems to be so well settled in Connecticut, that we are not at liberty to do so.

The decrees vacating and cancelling the appellant's mortgage, must, therefore, be affirmed.

WILLIAM W. LATHROP, Assignee in Bankruptcy of JAMES W. ADAMS, *Appl.*,

v.

SAMUEL DRAKE AND JOHN DRAKE, Jr., Exrs. of JOHN DRAKE, Deceased; WINFIELD S. HULICK, Admr. of DERICK HULICK, Deceased, AND SAMUEL DRAKE, now or late doing Business as DRAKE, HULICK & Co.

(See S. C., 1 Otto, 516-521.)

Action by assignee in bankruptcy.

Under the Bankrupt Act of 1867, an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a Circuit Court of the United States in any district other than that in which the decree of bankruptcy was made.

[No. 185.]

Argued Feb. 2, 1876. Decided Feb. 21, 1876.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This action was commenced by bill in equity in the court below, filed by the appellant. The defendants filed a general answer, denying the equities of the bill. Testimony was taken and bill set down for a hearing. Upon the argument the defendants raised objection, orally, to the jurisdiction of the court, and the court dismissed the bill. The bankrupt, James W. Adams, resided in the Western District of Pennsylvania, was adjudged a bankrupt there, and his assignee also resides there. The defendants reside in the Eastern District. These facts are set forth in the bill.

Messrs. David C. Harrington and F. Carroll Brewster, for appellant.

Mr. W. H. Armstrong, for appellees.

Mr. Justice Bradley delivered the opinion of the court:

The question in this case is, whether, under the Bankrupt Act, as passed in 1867, 14 Stat. at L., 517, an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a Circuit Court of the United States in any district other than that in which the decree of bankruptcy was made; if not, whether the amendatory Act of 1874, 18 Stat. at L., 178, sec. 3, validated such a suit already commenced.

The jurisdiction of the circuit courts in cases of bankruptcy, as conferred by the Act of 1867, was twofold, original and appellate; the latter being exercised in two different modes: by petition of review, and by appeal or writ of error. But the enacting clauses which confer this jurisdiction make such direct reference to the jurisdiction of the district court, that it is necessary first to examine the latter jurisdiction. Of this there are two distinct classes: first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; second, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The language conferring this jurisdiction of the district courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified; resulting, however, in the two general classes before mentioned. Were it not for the words "in their respective districts," the jurisdiction would extend to matters of bankruptcy arising anywhere without regard to locality. It is contended that these words confine it to cases arising in the district. But such is not the language. Their jurisdiction is confined to their respective districts, it is true, but it extends to all matters and proceedings in bankruptcy without limit. When the Act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. There are, it is true, limitations elsewhere in the Act; but they affect only the matters to which they relate. Thus, by section 11, the petition in bankruptcy, and by consequence the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided, or carried on business, for the six months next preceding; and the district court of that district, being entitled to and having acquired jurisdiction of the particular case, necessarily has such jurisdiction exclusive of all other district courts, so far as the proceedings in bankruptcy are concerned. But the exclusion of other district courts from jurisdiction over these proceedings does not prevent them

from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal courts cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the Act. The state courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Shearman v. Bingham*, 7 Nat. Bk. Reg., 490; and we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy.

Turning now to the jurisdiction of the circuit courts, we find it enacted in section 2 of the Act of 1867: first, that the circuit courts, within and for the districts where the proceedings in bankruptcy are pending, shall have a general superintendence and jurisdiction of all cases and questions arising under the Act. This is the revisory jurisdiction before referred to, exercised upon petition or bill of review. Second, "Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity * * * brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to or vested in such assignee." The Act of 1874 changes the words "the same district" to "any district," and adds to "person claiming an adverse interest" the words "or owing any debt to such bankrupt." These changes make the jurisdiction of the circuit court for the future clear and undoubted in cases like the present. But we are endeavoring to ascertain what jurisdiction was conferred by the Act as originally passed. Reverting to the language used in the second clause above cited, it seems to be express and unqualified, that the circuit courts shall have concurrent jurisdiction with the district courts of the same district. If, therefore, the district court has jurisdiction of suits brought by an assignee appointed in another district, the circuit court of the same district has concurrent jurisdiction therewith. There is no escape from this conclusion, unless the phrase "the same district" is made to refer back to the beginning of the section, where mention is

See 1 idro.

made of circuit courts within and for the districts where the proceedings in bankruptcy are pending. But the words, "the same district," used in the second clause, refer more naturally to the district in and for which the circuit court is held. The phrase, "the circuit courts shall have concurrent jurisdiction with the district courts of the same district," is, by itself, so clear and unambiguous, that a doubt could not have been raised as to its meaning, had it not been embraced in the same section with the other clause; and it is in accord with the general intent of the Act to invest the circuit court with jurisdiction co-extensive with that of the district court, except that it is only revisory in reference to the proceedings in bankruptcy.

If jurisdiction was conferred (as we have seen it was) on the various district courts, to entertain suits brought by assignees appointed in other districts, there seems to be no reason why the same jurisdiction should not have been conferred on the various circuit courts, but, on the contrary, very cogent reasons why it should have been. Important cases would be very likely to arise, both in amount and in the questions involved, which it would be desirable to bring directly before the circuit court, in order, if necessary, that an early adjudication might be had in the court of last resort.

As, therefore, the reason for such a provision, the general intent of the Act, and the words themselves, all coincide, we do not hesitate to say that the circuit court had jurisdiction of suits at law and in equity under the original Act, co-extensive with the district courts, unless the qualifying words at the end of the clause, confining the jurisdiction to cases "touching any property, or rights of property, of said bankrupt, transferable to or vested in such assignee," may be deemed a restriction. In this case, however, the suit does concern and have reference to property transferable to the assignee. It is brought to compel the defendants to restore to the bankrupt's estate the value of property sold by them under a judgment alleged to have been confessed in fraud of the Bankrupt Act, and within four months of the commencement of proceedings in bankruptcy.

The amendatory Act of 1874 has but little bearing upon the construction of the original Act in the particular involved in this case. Different views had been expressed in relation to its meaning, and the jurisdiction of the courts under it. The amendatory Act removed any ambiguity that may have existed, but did not thereby impress a more restricted meaning upon the language of the original Act than was due to it by a fair judicial construction.

As to the merits of the case, it is almost too plain for argument. The general denial of fraud in the answer of the defendants is equivalent to nothing more than a denial of a conclusion of law. The allegation that they were led to believe, by the letters and representations of the bankrupt, that he was solvent at the time of the confession of judgment, and was worth \$7,000 over and above his indebtedness, has but little force. If this were true, why did they immediately levy on and sell his whole stock of goods? That sale produced but little more than half the amount of their judgment. These unquestioned facts are sufficiently sig-

nificant, and the evidence of the bankrupt makes the case a very strong one for the complainant. He had executions against him, and wrote to the defendants that he was in trouble and requested them to come to his aid. They refused to do anything unless he would confess judgment for the amount due them, including the amount of the prior judgments. They then immediately levied on all his goods and sold him out. It was a clear case of preference by a debtor in insolvent circumstances, and known to be such by the judgment creditor.

The prior executions, one in favor of A. Coran & Co. for about \$600 and the other in favor of Henry Bloss for about \$900, were probably valid. If the appellees satisfied those executions, or advanced the money for that purpose, the amount being embraced in their judgment, their own execution was good to that extent and they should have credit therefor. As to the rest they were answerable for the value of the goods levied on and sold.

The decree of the Circuit Court must be reversed and the record remitted, with directions to enter a decree in favor of the complainant below for the value of the goods of the bankrupt sold on the defendant's execution, with interest from the time that the same was demanded of them by the assignee, less the amount to which they may be justly entitled for advances to satisfy the said executions of A. Coran & Co. and Henry Bloss.

Cited—92 U. S., 182; 93 U. S., 133; 94 U. S., 558; 98 U. S., 25; 9 Bls., 443; 6 Sawy., 588; 16 Blatchf., 53; 17 Blatchf., 405; 16 Bk. Reg., 287, 336; 17 Bk. Reg., 97, 294; 4 Dill., 167, 168; 25 Minn., 505.

HENRIETTA S. GOULD, EXRX. of CHARLES GOULD, Deceased, *Plff. in Err.*,

v.

THE EVANSVILLE AND CRAWFORDS-VILLE RAILROAD COMPANY.

(See S. C., 1 Otto, 526-536.)

Judgment on demurrer, effect of—when a bar—admitted averments.

1. A judgment rendered upon demurrer to the declaration is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, and the plaintiff can never after maintain against the same defendant or his privies, any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration.

2. If the plaintiff falls on demurrer in his first action from the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right.

3. Mere averments of a legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation.

[No. 125.]

Argued Jan. 27, 28, 1876. Decided Feb. 21, 1876.

ERROR to the Circuit Court of the United States for the District of Indiana.

The case is stated by the court.

Messrs. John B. Niles and Charles Tracy, for plaintiff in error:

Where a judgment is offered as an estoppel,

it is by legal presumption *judicium is inilum*, and must be strictly construed.

Best, Ev., 468; *Herman, Estop.*, 87, 88; *Kerr v. Hays*, 35 N. Y., 331; *Eastman v. Cooper*, 15 Pick., 276; *Gilbert v. Thompson*, 9 Cush., 348.

It is the settled law of Indiana, that such a judgment is not an estoppel or bar.

Stevens v. Dunbar, 1 Blackf., 56; *Sherry v. Foreman*, 6 Blackf., 56.

A judgment against a plaintiff on a demurrer to a declaration has never been held to be an estoppel except in rare cases where absolute identity is shown and it clearly appears that the very merits of the new case were necessarily determined in the decision upon the demurrer.

Stevens v. Dunbar (supra); *Sherry v. Foreman (supra)*; *Gilman v. Biscra*, 10 Pet., 296; *Wilbur v. Gilmore*, 31 Pick., 250.

Such a decision and judgment, that the plaintiff take nothing by his suit, is only equivalent to a judgment of nonsuit; that the defendant go hence and the plaintiff take nothing by his suit; and such a judgment, even on an agreed state of facts, is held to be no bar.

Knox v. Waldoborough, 5 Me., 185; *Wilbur v. Gilmore (supra)*; *Bridge v. Sumner*, 1 Pick., 370; *Morgan v. Bliss*, 2 Mass., 111; *Smith v. Bartholomew*, 1 Met., 276.

In the present case, the plaintiff's suit ought to have been sustained, even if the dictum of Gould's Pleading, p. 2, c. 9, sec. 45, was held to be sound law; because the plaintiff in this suit supplies averments which were lacking in the complaint in the state court. *Kerr v. Hays*, 35 N. Y., 331.

Messrs. Asa Iglehart and John E. Iglehart, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Special pleading is still allowed in certain jurisdictions; and, if the plaintiff and defendant in such a forum elect to submit their controversy in that form of pleading, the losing party must be content to abide the consequences of his own election.

Due service of process compels the defendant to appear, or to submit to a default; but, if he appears, he may, in most jurisdictions, elect to plead or demur, subject to the condition, that, if he pleads to the declaration, the plaintiff may reply to his plea, or demur; and the rule is, in case of a demurrer by the defendant to the declaration, or of a demurrer by the plaintiff to the plea of the defendant, if the other party joins in demurrer, it becomes the duty of the court to determine the question presented for decision; and if it involves the merits of the controversy, and is determined in favor of the party demurring, and the other party for any cause does not amend, the judgment is in chief; and it is settled law that such a judgment of the circuit court, if the sum or value in controversy is sufficient, may be removed into this court for re-examination by writ of error, under the 22d section of the Judiciary Act. 1 Stat. at L., 73. *Suydam v. Williamson*, 20 How., 486 [61 U. S., XV., 981]; *Gorman v. Lenox*, 15 Pet., 115.

Pleadings which were subsequently abandoned will be passed over without notice, except to say that the suit was commenced by the testator in his lifetime. Briefly described, the suit referred to was an action of debt to recover

the amount of a judgment which the testator of the plaintiff, as he alleged, recovered on the third of August, 1860, against the defendant Corporation, in the Supreme Court of the State of New York, by virtue of a certain suit therein pending, in which, as the decedent alleged, the court there had jurisdiction of the parties and of the subject-matter of the action; and he also alleged that the judgment still remains in full force, and not in anywise vacated, reversed or satisfied. Defensive averments, of a special character, are also contained in the declaration; to which it will presently become necessary to refer in some detail, in order to determine the principal question presented for decision. Suffice it to remark in this connection, that the testator of the plaintiff alleged in conclusion, that, by virtue of several allegations contained in the declaration, an action had accrued to him to demand and have of and from the defendant Corporation the sum therein mentioned, with interest from the date of the judgment.

Service was made, and the Corporation defendants, in the suit before the court, appeared and pleaded in bar of the action a former judgment in their favor, rendered in the County Circuit Court of the State of Indiana for the same cause of action, as more fully set forth in the record; from which it appears that the testator of the present plaintiff, then in full life, impleaded the Corporation defendants in an action of debt founded on the same judgment as that set up in the present suit, and alleged that he, the plaintiff, instituted his action in that case, in the Supreme Court of the State of New York, against the Evansville and Illinois Railroad Company, a Corporation created by the laws of the State of Indiana; that the said Corporation defendants appeared in the suit by attorney; that such proceedings therein were had, that he, on the third of August, 1860, recovered judgment against the said Corporation defendants for the sum therein mentioned, being for the same amount, debt and cost, as that specified in the judgment set up in the declaration of the case before the court; that the declaration in that case, as in the present case, alleged that the court which rendered the judgment was a court competent to try and determine the matter in controversy; and that the judgment remains in full force, unreversed and not paid.

Superadded to that, the defendants in the present suit allege, in their plea in bar, that the plaintiff averred in the former suit that the said Evansville and Illinois Railroad Company, by virtue of a law of the State of Indiana, consolidated their organization and charter with the organization and charter of the Wabash Railroad Company; that the two companies then and there and thereby became one company, by the corporate name of the Evansville and Crawfordsville Railroad Company; that the consolidated Company then and there by that name took possession of all the rights, credits, effects and property of the two separate companies, and used and converted the same, under their new corporate name, to their own use; and then and there and thereby became and were liable to pay all the debts and liabilities of the first named Railroad Company, of which the claim of the plaintiff in that suit is one; that the plaintiff also averred that the consolidated Company from that date directed and managed the defense

wherein the said judgment was rendered, and that the Act of consolidation and the aforesaid change of the corporate name of the Company were approved by an Act of the Legislature of the State; that the consolidated Company became and is liable to pay the judgment, interest and cost; that a copy of the judgment and proceedings mentioned in the declaration in that suit, as also copies of all the Acts of the Legislature therein referred to, were duly filed with said complaint as exhibits thereto; that the Corporation defendants appeared to the action, and demurred to the complaint; and that the court sustained the demurrer and gave the plaintiff leave to amend.

But the record shows that the plaintiff in that case declined to amend his declaration and that the court rendered judgment for the defendants. An appeal was prayed by the plaintiff; but it does not appear that the appeal, if it was allowed, was ever prosecuted; and the present defendants aver, in their plea in bar, that the matters and things set forth in the declaration in that case are the same matters and things as those set forth in the declaration in the present suit; that the plaintiff impleaded the defendants in that suit, in a court of competent jurisdiction, upon the same cause of action, disclosing the same ground of claim, and alleging the same facts to sustain the same, as are described and alleged in the present declaration; that the court had jurisdiction of the parties and of the subject-matter, and rendered a final judgment upon the merits in favor of the defendants and against the plaintiff, and that the judgment remains unreversed and in full force.

Plaintiff demurred to the plea; and the defendants joined in the demurrer, and the cause was continued. During the vacation, the original plaintiff deceased; and it was ordered that the cause be revived in the name of the executrix of his last will and testament. Both parties subsequently appeared and were heard; and the court, consisting of the circuit and district judges, overruled the demurrer to the plea in bar, and decided that the plea is a good bar to the action.

Instead of amending the declaration pursuant to the leave granted, the plaintiff filed a replication to the plea in bar, to the effect following: that the decision of the County Circuit Court of the State was not a decision and judgment on the merits of the case, but, on the contrary thereof, the judgment of that court only decided that the complaint or declaration did not state facts sufficient to sustain the action. In this, that, according to the allegations of the complaint, the original Evansville and Illinois Railroad Company, on the taking place of the alleged consolidation as set forth in the complaint, ceased to exist as a separate corporation; and that the complaint did not state any matters of fact showing a revivor of the suit against the consolidated company, or any facts which rendered such a revivor unnecessary; that the following allegations contained in the declaration in this case, and which were not contained in the complaint in the prior case, fully supply all the facts, for the want of which the demurrer was so sustained by the Judge of the County Circuit Court, and in the defense of which he, the said judge, held that the suit had abated by the consolidation.

Matters omitted in the former declaration and supplied in the present, as alleged in the replication of the plaintiff, are the following: (1) That the two Companies, on the 18th of November, 1852, by virtue of the Act to incorporate the Wabash Railroad Company, consolidated their charters, and united into one company under the name and style of the Evansville and Illinois Railroad Company; and that the consolidated Company, under that name, continued to appear to and defend the said action in the said Supreme Court. (2) That the Legislature of the State of Indiana subsequently enacted that the corporate name of the consolidated Company should be changed, and that the same should be called and known by the name of the Evansville and Crawfordsville Railroad Company, by which name the defendants have ever since been and now are known and called. (3) That the Act of the Legislature changing the name of the consolidated Company was subsequently duly and fully accepted by the directors of the Company, and that the Company became and was liable for all acts done by the two Companies and each of them. (4) That the consolidated Company appeared and defended the said action in the Supreme Court of the State of New York by the name of the Evansville and Illinois Railroad Company, and continued to defend the same until final judgment was rendered in the case. (5) That it did not, in any manner, appear in the former suit that the Act of the Legislature changing the name of the consolidated Company ever went into force by its acceptance, or that the consolidated Company had thereby, and by the acceptance of said Act, become liable for all acts done by the said two Companies before the consolidation, as is provided in the 2d section of said legislative Act. Wherefore the plaintiff says that the decision in that case was not in any manner a decision upon its merits, nor in any manner a bar to this action.

Responsive to the replication, the defendants filed a special demurrer, and showed the following causes: (1) That the reply is insufficient in law to enable the plaintiff to have and maintain her action. (2) That the reply does not state facts sufficient to constitute a defense to the defendants' plea. (3) That the reply does not state facts sufficient to constitute a good reply, nor to avoid the defendants' plea.

Hearing was had; and the court sustained the demurrer to the replication, and rendered judgment for the defendants; and the plaintiff sued out the present writ of error.

Questions of great importance are presented in the pleadings, all of which arise, in the first instance, from the demurrer of the defendants to the replication of the plaintiff. Leave to plead over by the plaintiff, after the testator's demurrer to the defendants' plea in bar, is not shown in the record; but, inasmuch as the replication of the plaintiff to the plea was filed without objection, the better opinion is that it is too late to object that the replication was filed without leave.

Technical estoppels, it is conceded, must be pleaded with great strictness; but when a former judgment is set up in bar of a pending action, or as having determined the entire merits of the controversy involved in the second suit, it is not required to be pleaded with any greater strict-

ness than any other plea in bar, or any plea in avoidance of the matters alleged in the antecedent pleading. Reasonable certainty is all that is required in such a case, whether the test is applied to the declaration, plea or replication, as the party whose pleading is drawn in question cannot anticipate what the response will be when he frames his pleading.

Cases undoubtedly arise where the record of the former suit does not show the precise point which was decided in the former suit, or does not show it with sufficient precision, and also where the party relying on the former recovery had no opportunity to plead it; but it is not necessary to consider those topics, as no such questions are presented in this case for decision. Aside from all such questions, and independent even of the form of the plea in bar, the plaintiff makes several objections to the theory of the defendants, that the former judgment set up in the plea is a conclusive answer to the cause of action alleged in the declaration.

First. They contend that a judgment on demurrer is not a bar to a subsequent action between the same parties for the same cause of action, unless the record of the former action shows that the demurrer extended to all the disputed facts involved in the second suit, nor unless the subsequent suit presents the same questions as those determined in the former suit.

Second. They also deny that a former judgment is, in any case, conclusive of any matter or thing involved in a subsequent controversy, even between the same parties for the same cause of action, except as to the precise point or points actually litigated and determined in the antecedent litigation.

Third. They contend that the declaration in the former suit did not state facts sufficient to sustain the alleged cause of action, and that the present declaration fully supplies all the defects and deficiencies which existed in the said former declaration.

1. Much discussion of the first proposition is unnecessary, as it is clear that the parties in the present suit are the same as the parties in the former suit; and it cannot be successfully denied that the cause of action in the pending suit is identical with that which was in issue between the same parties in the suit decided in the County Circuit Court. Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue; the rule in such a case being, that where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings, in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such a case is conclusive between the parties. *Outram v. Morewood*, 8 East, 858; *Greathard v. Bromley*, 7 T. R., 452.

2. Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time. 2 Taylor, Ev., sec. 1513.

Henderson v. Henderson, 3 Hare, 115; *Stafford v. Clark*, 2 Bing., 382; *Miller v. Covert*, 1 Wend., 487; *Bagot v. Williams*, 3 B. & C., 241; *Roberts v. Heim*, 27 Ala., 678.

Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law, that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and that the admission, even if by way of demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury. *Bouchaud v. Dias*, 3 Den., 244; *Perkins v. Moore*, 16 Ala., 17; *Robinson v. Howard*, 5 Cal., 428; *Aurora City v. West*, 7 Wall., 99 [74 U. S., XIX., 48]; *Goodrich v. Chicago*, 5 Wall., 578 [72 U. S., XVIII., 512]; *Beloit v. Morgan*, 7 Wall., 619 [74 U. S., XIX., 50].

From these suggestions and authorities two propositions may be deduced, each of which has more or less application to certain views of the case before the court: (1) That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is, that facts thus established can never after be contested between the same parties or those in privity with them. (2) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. *Rex v. Kingston*, 20 Howell, St. Tr., 588; *Hitchen v. Campbell*, 2 W. Bl., 881; *Clearwater v. Meredith*, 1 Wall., 43 [68 U. S., XVII., 609]; Gould, Pl., sec. 42; *Ricardo v. Garcias*, 12 Cl. & F., 400.

Support to those propositions is found everywhere; but it is equally well settled, that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action.

Aurora City v. West [*supra*]; *Gilman v. Rives*, 10 Pet., 298; *Richardson v. Boston*, 24 How., 188 [65 U. S., XVI., 625].

Viewed in the light of that suggestion, it becomes necessary to examine the third proposition submitted by the plaintiff; which is, that the demurrer to the declaration in the former suit was sustained because the declaration was materially defective, and that the present dec-

laration fully supplies all such imperfections and defects.

Different forms of expression, it may be conceded, are used in several instances, in the declaration in the last suit, from those employed in the complaint exhibited in the former suit; but the substance and legal effect of the two pleadings, in the judgment of the court, are the same in all material respects. Even without any explanation, it is so apparent that the first and second alleged differences in the two pleadings are unsubstantial, that the objections may be passed over without further remark. Nor is there any substantial merit in the third suggestion in that regard, when the same is properly understood.

8. It is to the effect that the legislative Act changing the name of the consolidated Companies was accepted by the directors; but the complaint in the former suit alleged that the consolidated Companies adopted the name of the Evansville and Crawfordsville Railroad Company, and that they took possession of all the rights, credits and property of the two companies, and used and converted the same to their own use, in said corporate name; and that said Company then and there and thereby became and were liable to pay all the debts and liabilities of the consolidated Company, of which the claim of the plaintiff is one.

4. All that need be said in response to the fourth alleged difference is, that the plaintiff averred in the former suit that the defendants, from the consolidation to the rendition of the judgment, by their attorney, directed and managed the original suit wherein the judgment in question was rendered.

5. Finally, the complaint is that it did not appear in the record of the former suit that the Act of the Legislature changing the name of the consolidated Company ever went into force by the acceptance of the same, or that the consolidated Company ever became liable for the acts of the two Companies done by those Companies before the consolidation took place.

Sufficient has already been remarked to show that there is no merit in that objection, for the reason that it appears in the former complaint that the two Companies, by virtue of the legislative Act, became consolidated, and that the name assumed by the consolidated Company was changed by an Act of the Legislature; that the consolidated Company, by the new corporate name, took possession of all rights, credits, effects and property of the original consolidated Company, and that they, under that corporate name, became liable to pay all the debts and liabilities of the prior consolidated Company; and they subsequently, by their attorney, directed and managed the defense in the suit wherein the said judgment was rendered.

Tested by these considerations, it is clear that the proposition that the defects, if any, in the declaration in the former suit were supplied by new allegations in the present suit, is not supported by a comparison of the two pleadings. Should it be suggested that the demurrer admits the proposition, the answer to the suggestion is, that the demurrer admits only the facts which are well pleaded; that it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not

supported by the terms of the instrument. *Ford v. Peering*, 1 Ves., Jr., 78; *Lea v. Robeson*, 12 Gray, 280; *Redmond v. Dickerson*, 1 Stockt., 507; *Green v. Dodge*, 8 Ohio, 486.

Mere averments of a legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation. *Nesbitt v. Berridge*, 8 L. T. R. (N. S.), 76; *Murray v. Clarendon*, L. R. 9 Eq., 11; Story, Eq. Pl., 254 b; *Ellis v. Colman*, 25 Beav., 662; *Dillon v. Barnard*, 21 Wall., 430 [88 U. S., XXII., 673].

Examined in the light of these authorities, it is clear that the construction of the declaration in the former suit, as well as in the present, is still open, and that there is no error in the record.

Judgment affirmed.

Dissenting, *Mr. Justice Bradley.*

Cited—94 U. S., 370; 66 Ind., 415; 31 Ohio St., 558.

SAMUEL B. LOWER, THE SUPERVISOR,
ALLEN S. WALTERS, THE TOWN CLERK,
AND SAMUEL B. LOWER AND PERRY
F. REMSBURG, THE JUSTICES OF THE PEACE
OF THE TOWN OF OHIO, IN THE COUNTY OF
BUREAU AND STATE OF ILLINOIS, *Plffs. in*
Err.,

v.

UNITED STATES, on the relation of GEORGE
O. MARCY, *Def. in Err.*

(See S. C., 1 Otto, 536-540.)

Mandamus to compel audit of town charge.

Where the state law provides specifically for the auditing of town charges, among which judgments are included, and for the levy of taxes to pay them, auditing a judgment is a mere ministerial act, the performance of which can be coerced by *mandamus*.

[No. 869.]

Submitted Jan. 24, 1876. Decided Feb. 21, 1876.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was a proceeding in the court below, by petition for a writ of *mandamus* against plaintiffs in error, to compel them, as Town Auditors for the Town of Ohio, Bureau Co., Ill., to audit the amount of a judgment rendered in said court at the March Term thereof, A. D. 1878.

The petition sets forth that the petitioner obtained a judgment for the sum of \$4,296.60, with costs of suit, amounting to the sum of \$228.70; that said Town of Ohio is, and was at the time of the rendition of said judgment, a municipal Corporation, by virtue of the township organization laws of the State of Illinois; that the said judgment was rendered on certain coupons, or interest warrants, representing the interest accrued on loans issued by said Town to the Illinois Grand Trunk Railway, by virtue of an Act of the General Assembly of said State, in force March 25, 1869; that plaintiffs in error were the Auditors of said Town; that a sworn statement of the amount of said judg-

ment was laid before said Auditors; and that there was delivered to the Supervisor of said Town, a certified copy of said judgment.

The petition further sets forth that said Auditors refused and neglected to comply with the demands of the petitioner to audit the amount of said judgment. The answer to the petition admitted the substantial allegations of the petition, but set up, among other things:

That the bonds and coupons on which the judgment was rendered were payable at the State Treasurer's office in Springfield, Ill.; that they had been registered with the State Auditor, under the Act of the State entitled "An Act to Fund and Provide for Paying the Railroad Debts of Counties, Townships, Cities and Towns," in force April 16, 1869; and that the means for the collection and payment thereof, or of judgments rendered thereon, are fully and solely prescribed by the provisions of said Act; that, believing the petitioner was entitled to the face of his coupons at the hands of the State Treasurer, the Auditors of Ohio audited and allowed \$871.78 only for the interest on the judgment and interest on coupons included in the judgment, and for the costs of suit.

That the merging of the coupons into the judgment does not change their character nor the mode of collecting the same, and that the judgment is not a town charge within the meaning of section 6, article 5, of the Illinois Township Law.

To this answer the petitioner demurred.

The court sustained the demurrer and entered judgment thereon.

Messrs. J. J. Heron and T. Lyle Dickey, for plaintiffs in error.

Mr. George O. Ide, for defendant in error.

Mr. Justice Davis delivered the opinion of the court:

The answer in this case presents no defense to the collection of the judgment in the manner sought by the petition. The judgment was rendered upon certain coupon notes of the Town of Ohio, a municipal Corporation of Bureau County, and the object of the petition is to compel the plaintiffs in error, as Town Auditors, to audit it, so that it can be placed in process of collection in accordance with the Illinois Township Law. This law provides specifically for the auditing of town charges, among which judgments are included; and for the levy of taxes to pay them (Rev. Stat. of Ill., 1874, p. 1080), but the plaintiffs in error say that judgments like the one in question can only be collected through the mode pointed out in the Funding Act of April 16, 1869. R. S. of Ill., 1874, p. 791, *et seq.*

If this were so the relator would be placed in an unfortunate predicament, as he could not resort to local taxation to collect his judgment, nor oblige the State to pay it.

The Funding Act, originating in the necessities of the indebted municipalities of the State, proposed a mode to help them, by the collection and disbursement of a state tax levied within their respective limits; but the State expressly disclaimed all liability on account of their indebtedness, and only assumed the character of a custodian of the money which reached the Treasury. The Act did not profess to change the terms of the securities, nor exempt the mu-

municipality from the obligation to pay them. They were, it is true, registered in the office of the Auditor of Public Accounts, and payable at the Treasury of the State, but the holder was not required to resort only there for payment. This means might fail, but, whether it did or not, his right secured in the instrument of holding the municipality liable for the debt was not thereby impaired. This is especially true when the coupons have been merged in a judgment, for there is no provision in the Funding Act to pay it. Even if it could be paid from the taxes levied by the State Auditor, the remedy invoked by the relator is not taken away. It would be singular if it were, when the Town owes the debt, and the judgment so declares. The statute (R. S. of Ill., 1874, p. 691) provides "That the writ of *mandamus* shall not be denied because the petitioner may have another specific legal remedy, when such writ will afford a proper and sufficient remedy." Under it the inquiry whether there is even a better remedy than the one asked for, does not arise. It is enough to know that the writ is an appropriate and efficient remedy to compel town auditors to audit a charge against the town when their action is necessary to determine the amount of money to be raised by taxation. In Illinois an ordinary execution does not issue on such a judgment, but the corporate authorities, on refusal to pay, can be required to levy a tax for the purpose when the Board of Auditors have certified that the charge against the town is a proper one. The relator took the necessary steps to have this certificate made, but the plaintiffs in error only allowed a small portion of the balance due on the judgment, without any legal excuse for not auditing the residue. They admit in their answer the existence of the judgment and the amount due thereon, and are not at liberty to question the liability of the Town to pay it. It does not differ, so far as they are concerned, from one obtained against the Town for ordinary charges. Auditing it, so that provision may be made for its payment by taxation, is a mere ministerial act not involving the exercise of official discretion, the performance of which can be coerced by *mandamus*. It was rendered by a court having jurisdiction of the parties and the subject-matter, and there is no controversy as to the amount due the relator.

The circuit court in this case commanded the auditors to meet forthwith and audit the judgment.

Although we are not prepared to say the court exceeded its power in this particular, yet we are of the opinion that the carrying out this order might lead to embarrassments, and that it were better it should be modified. The statute requires that the Board of Auditors shall meet semi-annually to examine and audit town charges. It is made their duty to cause a certificate of their proceedings to be filed with the town clerk, for the purpose of having the same certified to the clerk of the county, in order that the amount certified may be by him levied and collected by taxation in the manner prescribed by the revenue laws of the State.

If the clerk should be advised that he was not authorized to extend a tax for the collection of this judgment, on a certificate of the auditors made at an irregular meeting, the relator

See 1 Otto.

U. S., Book 28.

would be still further delayed, as the writ in this case operates on the auditors, and not on the clerk. In order to avoid the delay, if nothing more, which would occur if such a question were raised, it is advisable that the auditors be required to meet at a time authorized by the statute.

The judgment of the Circuit Court will, therefore, be modified, so as to direct the Board to assemble at their next regular semi-annual meeting and allow said judgment.

I, James H. McKenney, Clerk of the Supreme Court of the United States, hereby certify that the foregoing is a true copy of the opinion of the court in the case of *Samuel B. Lower, Supervisor, et al., Plffs. in Err., v. The United States*, No. 869, of October Term, 1875, as the same remains upon the official records of the said Supreme Court.

[L. S.] In testimony whereof I hereunto subscribe my name and affix the seal of the said Supreme Court, at the City of Washington, this thirty-first day of January, A. D. 1885.

JAMES H. MCKENNEY,
Clerk U. S. Sup. Ct.

Cited—10 Blas., 467.

JOHN WARREN AND J. KEARNEY WARREN, *Plffs. in Err.*,

SHERIDAN SHOOK, late COLLECTOR OF INTERNAL REVENUE.

(See S. C., 1 Otto, 704-712.)

Banker, who is—broker, who is—when subject to duty.

1. Having a place of business where deposits are received and paid out on checks and where money is loaned upon security, is the substance of the business of a banker, as defined by the Internal Revenue Act.

2. By the same Act, a broker is defined to be one whose business it is to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank-notes, promissory notes or other securities, for himself or for others.

3. It is only when making sales and purchases is his business, his trade, his profession, his means of getting his living or of making his fortune, that he becomes a broker within the meaning of the statute.

4. When it is his business, the statute properly holds all such acts, whether in the name of himself ostensibly or in the name of others, as the acts of a broker.

5. When bankers do the business of brokers, they are subject to the tax on brokers specified in the Act.

[No. 856.]

Argued Feb. 8, 9, 1876. Decided Feb. 21, 1876.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. B. K. Phelps and S. G. Clarke, for plaintiff in error.

Mr. E. B. Smith, Asst. Atty-Gen., for defendant in error.

Stipulation Recorded with Opinion.

This case was tried upon the following agreed statement of facts:

First. That the plaintiffs from the first day of April, 1865, to the first day of May, 1866, were copartners in the City of New York, doing business under the firm name of John Warren & Son.

Second. That, during such time the plaintiffs, as such copartners, had a place of business in the Thirty-Second Collection District of New York, where credits were opened by the deposit and collection of money and currency subject to be paid or remitted upon draft, check or order, and where money was advanced and loaned by plaintiffs on stocks, bonds, bullion, bills of exchange and promissory notes, and where stocks, bonds, bullion, bills of exchange and promissory notes, were received by plaintiffs for discount and sale.

Third. That, during the period aforesaid, the said plaintiffs, as such copartners, duly paid the special tax imposed upon them as bankers, in accordance with the provisions of the 79th section of the Act of Congress entitled "An Act to Provide Internal Revenue to Support the Government," etc., approved June 30, 1864.

Fourth. That, during the period aforesaid, the defendant was Collector of Internal Revenue for the said Thirty-Second Collection District of New York.

Fifth. That, during the period aforesaid, the plaintiffs bought and sold stock and gold, both of their own property on their own account, and also upon commission for other parties.

The sales in question were of three kinds:

1. Sales of their own property.
2. Sales of gold, stocks, bonds, bullion, etc., transmitted to them by their correspondents, and the same or the proceeds drawn against; in some of which cases the sales of the transmitted property were made immediately, and the proceeds at once applied to the payment of drafts so drawn, and in others of which the drafts were accepted or paid; and the gold, stock, etc., were held for a better market, or to await further orders, and in the meantime stood as their security for their advances, and to provide reimbursement therefor. In other cases there were no actual advances, but the property held for sale; and when sold by order of the customer, the proceeds were placed to credit, subject to draft.

3. Sales of stock made in pursuance of an arrangement for what is called carrying stocks on a margin, wherein they, upon the deposit with them of a percentage on the amount of the stocks, advanced money and purchased stocks for the dealer or speculator (who dealt in hope of making a profit by the rise in the market price), and held the same subject to his order to sell, and finally sold the same for his account as to profit and loss. These transactions were conducted in the name of the plaintiffs, the name of the customer not being disclosed to those to whom the stocks were finally sold.

Upon these purchases and sales they charged and received from their customers the usual commission for purchasing and selling stocks for account of others; and the tax imposed and paid to the United States on the sales was also charged to such customers. If the transaction showed a profit, it was paid to the customer, with a return to him of the cash or security held as a margin; if the transaction resulted in a loss, the amount of such margin returned to the customer was correspondingly reduced.

Sixth. That, during the period aforesaid, the Assessor of Internal Revenue for the said district assessed monthly against the said plaintiffs the tax of one twentieth of one per centum on

stock, securities, gold, etc., provided for by the 99th section of the Act aforesaid, to be paid by brokers and bankers doing business as brokers, and assessed such tax against the plaintiffs alike upon the securities, stocks, bullion, etc., sold by them on commission for others, and upon those owned by said plaintiffs, and sold by them upon their own account.

Seventh. That, at the times of the said several assessments so made by said assessor, the plaintiffs protested against their liability to pay, and against the right of the said assessor to impose or assess, the said tax of one twentieth of one per centum, or any other sum whatever, upon the value of the stocks, gold or securities owned by said plaintiffs, and sold by them upon and for their own account, and not upon commission or for others.

Eighth. That the assessment roll containing said assessment was transmitted to the said defendant as such collector; and the said defendant, as such collector, demanded from said plaintiffs the whole sum so assessed against them by said assessor as and for the said tax; and the plaintiffs were compelled to pay, and did pay under protest, to the said defendant, as such collector, the said tax upon the whole amount of their sales during said period, including sales made on their own account as aforesaid.

Ninth. That the amount of such payments so made by the said plaintiffs, with the dates thereof, are correctly set forth in the schedule hereto annexed, marked "A"; the first column in such schedule showing the whole amount of such tax paid at the respective dates therein indicated; and the second column showing the portions of said several payments, which were for taxes upon sales made by plaintiffs upon their own account, and not upon commission, and which plaintiffs seek in this action to recover.

Tenth. That about the 3d day of December, 1870, the plaintiffs duly appealed, pursuant to law and the regulations of the Treasury Department made in pursuance thereof, to the Commissioner of Internal Revenue, from the assessment and collection of said taxes, imposed upon said plaintiffs, upon sales made by them upon their own account, and claimed by them to be erroneously and illegally assessed against and collected from them; and the said commissioner, on the 24th day of May, 1871, and less than six months before the commencement of this action, rendered his decision upon said appeal adversely to these plaintiffs.

No further evidence was offered by either party.

Thereupon the counsel moved the said court that judgment be entered for the defendant, and said plaintiff's counsel moved that judgment be entered for the plaintiffs.

After argument and deliberation, the court denied the said motion of said plaintiffs' counsel: whereupon the said counsel for the plaintiffs did then and there duly except thereto.

The court then directed that judgment be entered for the defendant; to which direction and conclusions of law of the court upon the foregoing facts set forth in said direction the said plaintiffs' counsel then and there duly excepted.

Signed,

24. U. S.

B. K. Phelps, for the plaintiffs in error.
Edwin B. Smith, Asst. Atty-Gen., for the defendant in error.

Mr. Justice Hunt delivered the opinion of the court:

The plaintiffs were licensed bankers in the City of New York. They also bought and sold gold and stocks for others upon a commission paid to them for that service. On their own account, they also dealt largely in gold and stocks. They have paid the taxes imposed by the revenue laws upon bankers. The government agents have now imposed upon them, and collected the taxes chargeable by law upon brokers. This includes the tax of one twentieth of one per cent. upon sales made by the plaintiffs on their own account, as well as upon sales made for others. It is to this that the plaintiffs object, and the present action is brought to recover back such taxes.

The questions would seem to be:

1. Do the transactions specified make the defendants brokers within the meaning of the revenue laws?

2. Are licensed bankers, who also do business as brokers, liable to the additional tax imposed upon brokers?

3. More precisely; are the plaintiffs liable to pay taxes upon sales made on their own account, as well as when made for others?

Section 110 of the Act to provide internal revenue, etc., approved June 30, 1864, 13 Stat. at L., 277, imposes a duty of one twenty fourth of one per cent. each month on deposits, one twenty fourth of one per cent. each month on capital, one twelfth of one per cent. each month on the circulation, and an additional one sixth of one per cent. on certain specified excess of circulation, to be paid by "any bank, association, company or corporation, or person engaged in the business of banking, beyond the amount invested in United States bonds."

Section 79, subdivision of the same Act, 13 Stat. at L., 251, provides "That bankers using or employing a capital not exceeding the sum of \$50,000 shall pay \$100 for each license," and for every additional \$1,000 of capital, \$2; and that "Every person, firm or company, and every incorporated or other bank having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale, shall be regarded a banker under this Act."

The same section 79, subdivision 9, as amended by the Act of March 3, 1865, 13 Stat. at L., 253, 472, provides "That every person, firm or company, except such as hold a license as a banker, whose business it is, as a broker, to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes or other securities, for themselves or others, shall be regarded as a broker under this Act; provided that any person holding a license as a banker shall not be required to take out a license as a broker;" and it further provides that "Brokers shall pay \$50 for each license."

See 1 OTTO.

The 99th section of the same Act provides, 13 Stat. at L., 278, "That all brokers and bankers doing business as brokers shall be subject to pay the following duties and rates of duties, upon the sales of merchandise, produce, gold and silver, bullion, foreign exchange, uncurrent money, promissory notes, stocks, bonds and other securities, as hereinafter mentioned, etc.; that is to say, upon all sales and contracts for sales, of stocks and bonds, one twentieth of one per centum on the par value thereof; and of gold and silver, bullion and coin, foreign exchange, promissory notes or other securities, one twentieth of one per centum on the amount of such sales and of all contracts for sales."

The sections we have quoted furnish satisfactory definitions of the business of a banker and of that of a broker. "Every person, etc., having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order, or where money is advanced on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale, shall be regarded as a banker under this Act." Sec. 79, sub. 1.

Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker.

By the same section, sub. 9, a broker is defined to be one whose business is to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or other securities, for himself or for others. Ordinarily, the term "broker" is applied to one acting for others; but the part of the definition which speaks of purchases and sales for himself is equally important as that which speaks of sales and purchases for others. All parts of the definition are qualified by the words "whose business it is." Thus, if A B has \$10,000 which he desires to invest, and purchases United States stock, or state stock, or any other securities, he does not thereby become a broker. Nor if he owns \$10,000 of U. S. stock which he wishes to sell to raise money to pay his debts, or because he is not satisfied with six per cent. interest, is he thereby made a broker. It is only when making sales and purchases is his business, his trade, his profession, his means of getting his living, or of making his fortune, that he becomes a broker within the meaning of the statute. Nor is it believed that a sale, by one doing a banking business only, of a security received by him for the repayment of a legitimate loan, would make him a broker, and subject to the tax. This would not be deemed an act of brokerage, either under the statute or upon general principles of law. When it is his business, the statute properly holds all such acts, whether in the name of himself ostensibly or in the name of others, as the acts of a broker. The danger and the facility for evasion of the statute furnish excellent reasons for the adoption of this provision.

The contention of the plaintiffs is, that, because they hold a license as bankers, they are not liable to the duty of one twentieth of one per centum on sales made on their own ac-

count. This is based upon the words of section 79, subdivision 9, that all persons, etc., except such as hold a license as bankers, shall be liable to this duty on sales made for themselves as well as others, and upon the further suggestion that section 99 does not contain the words "for themselves or others." We agree with the statement of *Mr. Justice Grier* in *U. S. v. Fisk*, 8 Wall., 445 [70 U. S., XVIII., 248], that the idea of Congress would have been better expressed if the words "for themselves or others" had been inserted in section 99, rather than where they are now found. Still, we find no difficulty in reaching the conclusion that the tax in this case was properly imposed.

The intent of Congress to subject to taxation all sales made by those engaged in the business of brokers is plain enough. When it was said, section 99, "that all brokers and bankers doing business as brokers shall be subject" to the duties specified, it was intended to encompass the entire class of persons engaged in the business of buying and selling stocks and coin. Brokers were included by name and by definition. Bankers would not so certainly be embraced by the definition given in section 79, subdivision 1. To meet this possible exception, it was enacted, that, when bankers should do the business of brokers, they should be subject to the duty specified. In this manner, brokers technically, and bankers doing the business of brokers, were made liable to the duty. If the right to tax bankers upon sales made for themselves rested on the 79th section alone, a plausible argument could be made in the plaintiffs' favor, arising from the words "except such as hold a license as a banker;" but when we read in section 99, "that all brokers, and bankers doing business as brokers," shall be subject to the tax, and consider the statutory definition of a broker, the plausibility of the argument ceases.

We have carefully considered the cases of *U. S. v. Fisk* [*supra*]; *U. S. v. Cutting*, 3 Wall., 441 [70 U. S., XVIII., 241], and *Clark v. Gilbert*, 5 Blatchf., 380, but do not deem it necessary to comment upon them in detail.

The judgment is affirmed.

JOHN R. SHEPLEY, CHARLES PARSONS AND JOHN F. GIBBONS, Devises and Trustees under the will of WILLIAM M. MCPHERSON, Deceased, *Plffs. in Err.*,

JOHN EPPES COWAN ET AL.

(See S. C., 1 Otto, 380-340.)

Public lands, when reserved from sale—preemption right—first in time, first in right—lands given to States—decision of Land Department when open to review—remedy for erroneous decision.

*1. Whenever, in the disposition of the public lands, any action is required to be taken by an officer of the Land Department, all proceedings tending to defeat such action are impliedly inhibited. Accordingly, where an Act of Congress of 1812 directed a survey to be made of the out-boundary

* Head notes by *Mr. Justice FIELD*.

NOTE.—Preemption rights. See note to *U. S. v. Fitzgerald*, 40 U. S. (15 Pet.), 407.

line of the Village of Carondelet, in the State of Missouri, so as to include the commons claimed by its inhabitants, and a survey made did not embrace all the lands thus claimed, the lands omitted were reserved from sale until the approval of the survey by the Land Department, and the validity of the claim to the omitted lands was thus determined.

2. Where a State seeks to select lands as a part of the grant to it by the 8th section of the Act of Congress of Sep. 4, 1841, and a settler seeks to acquire a right of preemption to the same lands, the party taking the initiatory step, if the same is followed up to patent, acquires the better right to the premises. The patent relates back to the date of the initiatory Act, and cuts off all intervening claimants.

3. The 8th section of the Act of Sep. 4, 1841, in authorizing the State to make selections of land, does not interfere with the operation of the other provisions of that Act regulating the system of settlement and preemption. The two modes of acquiring title to land from the United States are not in conflict with each other. Both are to have full operation, that one controlling in a particular case under which the first initiatory step was had.

4. Whilst, according to previous decisions of this court, no vested right in the public lands against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.

5. Where a party has settled upon public land with a view to acquire a right of preemption, the land being open to settlement, his right thus initiated is not prejudiced by a refusal of the local land officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from sale.

6. The rulings of the Land Department on disputed questions of fact, made in a contested case as to the settlement and improvements of a preemption claimant, are not open to review by the courts when collaterally assailed.

7. The officers of the Land Department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of preemption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions. But, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President.

[No. 141.]

Argued Feb. 9, 10, 1876. Decided Feb. 23, 1876.

IN ERROR to the Supreme Court of the State of Missouri.

This action was commenced by a petition filed by McPherson, testator of plaintiffs in error, in the Circuit Court of St. Louis County where he obtained judgment. This judgment was reversed in the Supreme Court of the State and his petition dismissed. The case is stated in the opinion.

Messrs. P. Phillips, Glover and Shepley, for plaintiffs in error.

Messrs. Britton A. Hill and Montgomery Blair, for defendants in error.

Mr. Justice Field delivered the opinion of the court:

This is a suit in equity, brought, according to the practice obtaining in Missouri, to settle the conflicting claims of the parties arising from their respective patents, to a fractional

section of land comprising thirty-seven acres and two fifths of an acre, situated in that State. The plaintiffs assert title to the premises under a patent issued to William M. McPherson by the Governor of the State, bearing date on the 27th of February, 1850, purporting to be for lands selected under the 8th section of the Act of Congress of Sep. 4, 1841, entitled "An Act to appropriate the Proceeds of the Sales of the Public Lands and to Grant Preemption Rights," 5 Stat. at L., 458; and the defendants claim title to the premises under a patent of the United States, bearing date on the 21st of July, 1866, issued to the heirs of Thomas Chartrand upon an alleged preemption right acquired by a settlement of their ancestor.

The 8th section of the Act of Sep. 4, 1841, declared that there should be granted to each State specified in its 1st section—and among them was the State of Missouri—five hundred thousand acres of land for purposes of internal improvement, the selection of the land in the several States to be made within their respective limits, in such manner as the Legislatures thereof should direct, but in parcels conformably to sectional divisions and subdivisions of the public surveys, and of not less than three hundred and twenty acres in each, from any public land except such as was or might be reserved from sale by any law of Congress or Proclamation of the President. Several Acts were passed by the Legislature of Missouri for the selection and disposition of the land thus granted. One of them, passed on the 10th of March, 1849, L. of Mo., 1849, p. 64, authorized the Governor of the State to dispose, at private sale, of so much of the land as then remained to be selected, and to issue to the purchasers certificates empowering them to locate the quantity purchased, in conformity with the Act of Congress. The purchasers were to inform the Governor of the lands selected, and he was to notify the Secretary of the Treasury that the selections were made for the State; and, if approved by the Secretary, patents were to issue to the purchasers.

Where the land selected in any instance contained less than three hundred and twenty acres, the Governor was required, upon the request of the purchaser and upon payment for the full amount, to relinquish the surplus to the United States. Of the certificates thus issued, one was held by William M. McPherson; and under it a selection was made by him of the premises in controversy. Of this selection the Governor of the State informed the Secretary of the Treasury on the 15th of December, 1849, and requested his approval of it; at the same time relinquishing to the United States the surplus between the amount selected and three hundred and twenty acres. At that time the supervision of the land office had been transferred from the Secretary of the Treasury to the Secretary of the Interior, whose department was created in March of that year. The selection of McPherson was accordingly brought to the latter's attention, and was approved by him on the 17th of January following; subject, however, to any rights which may have existed at the time the selection was made known to the land officers by the agent of the State. On the 27th of February following, a patent of the State of Missouri for the premises was issued to

McPherson by the Governor. Upon the title thus conferred, the plaintiffs repose and ask judgment in their favor.

In considering the validity of this title, the first question for solution is, whether the premises were then open to selection by the State; for whether the 8th section of the Act of 1841 be construed as conferring a grant *in presenti*, operating to vest the title in the State upon the selection of the land pursuant to its directions, notwithstanding the words of grant used are in the future tense—in that respect resembling the grant of the State of North Carolina to General Greene, which was the subject of consideration by this court in the case of *Rutherford v. Greene*, reported in the 2d of Wheaton, 196—or whether the section be considered as giving only the promise of a grant, and therefore requiring further legislation, or further action in some form of the Government, to vest the title of the land selected in the State, as held, or rather implied, by the decision in the case of *Foley v. Harrison*, reported in the 15th of Howard, 438, the same result must follow if the land were not at the time open to selection. If not thus open, the whole proceeding on the part of McPherson and the Governor of the State to appropriate the land was ineffectual for any purpose. That the land was not thus opened, we think there is no doubt. The land was then claimed as part of the commons of Carondelet. The Villages of St. Louis and Carondelet, on the acquisition of Louisiana in 1803 and for many years previously, claimed as commons certain lands adjoining their respective settlements. Those of St. Louis extended south of the village of that name, those of Carondelet to the north of its village; and a well known line was generally recognized as the boundary separating the commons of the two villages. That line commenced on the bank of the Mississippi at what is known as Sugar-loaf Mound, about four miles south of the settlement of St. Louis, and two miles north of that of Carondelet, and ran westerly to the common fields of Carondelet. It was contended, in the controversy which subsequently arose between the Cities of St. Louis and Carondelet, that this line had been surveyed and marked by Soulard, a Spanish surveyor, previous to 1800, by order of the Lieutenant-Governor of the upper province of Louisiana. Be that as it may, it is clear that from the acquisition of the country until June 18, 1812, the land south of this line was claimed and used by the inhabitants of Carondelet as within their commons. On that day Congress passed an Act confirming to the inhabitants of these villages their claims to their common lands. 2 Stat. at L., 748. The Act was a present operative grant of all the interest of the United States in the property used by the inhabitants of the villages as their commons; but it did not refer to the line mentioned, or designate any boundary of the commons, but left that to be established by proof of previous possession and use. The Act at the same time made it the duty of the deputy-surveyor of the Territory to survey the out-boundary lines of the villages so as to include the commons respectively belonging to them, and make out plats of the surveys, and transmit them to the Surveyor-General, by whom copies were to be forwarded to the Commissioner of the General Land Office and the Recorder of Land Titles. No

survey appears to have been made, as here directed, of the out-boundary line of the Village of Carondelet, until the year 1816; but its inhabitants claimed under the Act the ownership and title of the land as part of their commons, up to the line mentioned on the north, as the same had been claimed and used by them previously. In 1816 or 1817, Elias Rector, a deputy-surveyor, under instructions from his superior, made a survey of the commons, running the upper line about a mile below the line alleged to have been established by Soulard. Some years afterwards (in 1834), another deputy-surveyor, by the name of Joseph O. Brown, was ordered by the Surveyor General to retrace and mark anew the lines of this survey, and connect them with the surveys of adjoining public lands and private claims. This was accordingly done by him; and it would seem by various proceedings of the authorities of Carondelet that the survey thus retraced was at one time acquiesced in by them as a determination of the boundaries of their commons. They had a copy of it framed for the benefit of the town, and they introduced it in several suits with different parties as evidence of the extent of their claim. But at another time they denied the correctness of its northern line, which they insisted should be coincident with that alleged to have been run by Soulard. When St. Louis, in 1836, proceeded to subdivide her commons into lots down to the line of the survey, they gave notice, through a committee, that the lands below the alleged Soulard line were claimed as part of their commons; and, in 1855, Carondelet entered a suit against St. Louis for the possession of those lands. In the meantime, the matter remained undetermined in the Land Department at Washington until the 23d of February of that year. During this period, the Commissioner of the General Land Office repeatedly informed the local land officers that the tract was reserved from sale because it was claimed as part of the Carondelet commons, and on that ground their refusal to receive proofs of settlement from parties seeking to acquire a right of preemption was approved; and appropriate entries stating such reservation were made in the books of those officers. At one time, January, 1852, the Secretary of the Interior decided to have a new survey of the commons, and gave orders to that effect. The Surveyor General for Missouri having asked instructions as to the manner of the survey, and stating that, in his opinion, the new survey should include the land in controversy, the secretary then in office, the successor of the one who had ordered a new survey, re-examined the whole subject, and recalled the direction for a new survey made by his predecessor, and held that as the surveys of 1816 and 1834 had been executed by competent authority and approved, and were for years acquiesced in by the inhabitants of Carondelet, both they and the Government of the United States were estopped and concluded by them; and that, in consequence, the survey of 1816, as retraced in 1834, should be sustained, excluding therefrom a tract which had been reserved for a military post. This was the final determination of the boundaries of the Carondelet commons by that department of the Government to which the supervision of surveys of public grants was intrusted. A few days before this determination was announced, the

suit mentioned, of the City of Carondelet against the City of St. Louis, was commenced to obtain possession of the lands below the Soulard line, over a portion of which the St. Louis commons had been extended. That suit was finally disposed of by the judgment of this court in March, 1862, affirming that of the Supreme Court of the State, to the effect that both the Government and Carondelet were concluded by the surveys stated.

The Act of 1812 contemplated that the out-boundary line of the village would be surveyed so as to include the commons claimed, in accordance with the possession of the inhabitants previous to 1803, and not arbitrarily, according to the caprice of the surveyor; and any line run by him was subject, like all other surveys of public grants, to the supervision and approval of the Land Department at Washington. Until surveyed, and the survey was thus approved, the land claimed by Carondelet was, by force of the Act requiring the survey and the establishment of the boundaries, necessarily reserved from sale. It was thus reserved to be appropriated in satisfaction of the claim, if that should be ultimately sustained. Whenever, in the disposition of the public lands, any action is required to be taken by an officer of the Land Department, all proceedings tending to defeat such action are impliedly inhibited. The allowance of selections by the States, or of preemptions by individuals, of lands which might be included within grants to others, might interfere and in many instances would interfere with the accomplishment of the purposes of the Government. A sale is as much prohibited by a law of Congress, when to allow it would defeat the object of that law, as though the inhibition were in direct terms declared. And it is the general rule of the Land Department and has been the rule from the commencement of the government to hold as excluded from sale or preemption lands which might, in the execution of the laws of Congress, fall within grants to others; and, therefore, in this case, until it was decided by the final determination of the Secretary of the Interior or of the Supreme Court of the United States whether the northern line of the commons was that run, as alleged, by Soulard previous to 1800, or that retraced by Brown in 1834, the land between those lines, embracing the premises in controversy, was legally reserved from sale and, consequently, from any selection by the State as part of its five hundred thousand acres granted by the Act of Sep. 4, 1841.

But there is another view of this case which is equally fatal to the claim of the plaintiffs. If the land outside of the survey as retraced by Brown in 1834 could be deemed public land, open to selection by the State of Missouri from the time the survey was returned to the land office in St. Louis, it was equally open from that date to settlement, and consequent preemption by settlers. The same limitation which was imposed by law upon settlement was imposed by law upon the selection of the State. In either case the land must have been surveyed, and thus offered for sale or settlement. The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards is-

sued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the Land Office; and the patent upon a preemption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office. The action of the State and of the settler must, of course, in some way be brought officially to the notice of the officers of the Government having in their custody the records and other evidences of title to the property of the United States before their respective claims to priority of right can be recognized. But it was not intended by the 8th section of the Act of 1841, in authorizing the State to make selections of land, to interfere with the operation of the other provisions of that Act regulating the system of settlement and preemption. The two modes of acquiring title to land from the United States were not in conflict with each other. Both were to have full operation, that one controlling in a particular case under which the first initiatory step was had.

Nor is there anything in this view in conflict with the doctrines announced in *Frisbie v. Whitney*, 9 Wall., 187 [76 U. S., XIX., 668], and the *Yosemite Valley* case, 15 Wall., 77 [82 U. S., XXI., 82]. In those cases the court only decided that a party, by mere settlement upon the public lands, with the intention to obtain a title to the same under the preemption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or other public purposes for which real property is required by the Government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceased when all the preliminary Acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers, and ultimately to a patent of the United States. Until such payment and entry, the Acts of Congress gave to the settler only a privilege of preemption in case the lands were offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others.

But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have

determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. So in this case, Chartrand, the ancestor, by his previous settlement in 1835 upon the premises in controversy, and residence with his family, and application to prove his settlement and enter the land, obtained a better right to the premises, under the law then existing, than that acquired by McPherson by his subsequent state selection in 1849. His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if in point of fact the reservation had then ceased. The reservation was asserted, as already mentioned, on the ground that the land was then claimed as a part of the commons of Carondelet. So soon as the claim was held to be invalid to this extent by the decision of this court in March, 1862, the heirs of Chartrand presented anew their claim to preemption, founded upon the settlement of their ancestor. The Act of Congress of March 3, 1853, 10 Stat. at L., 244, provided that any settler who had settled or might thereafter settle on lands previously reserved on account of claims under French, Spanish, or other grants, which had been or should thereafter be declared invalid by the Supreme Court of the United States should be entitled to all the rights of preemption granted by the Act of Sep. 4, 1841, after the lands were released from reservation, in the same manner as if no reservation had existed. With the decision declaring the invalidity of the claim to the land in controversy, all obstacles previously interposed to the presentation of the claim of the heirs of Chartrand and the proofs to establish it were removed. According to the decisions in *Frisbie v. Whitney* and the *Yosemite Valley* case, Congress might then have withdrawn the land from settlement and preemption, and granted it directly to the State of Missouri, or reserved it from sale for public purposes, and no vested right in Chartrand or his heirs as against the United States would have been invaded by its action; but, having allowed by its subsisting legislation the acquisition of a right of preference as against others to the earliest settler or his heirs, the way was free to the prosecution of the claim of the heirs.

If the matter were open for our consideration, we might perhaps doubt as to the sufficiency of the proofs presented by the heirs of Chartrand to the officers of the Land Department to establish a right of preemption by virtue of the settlement and proceedings of their ancestor, or by virtue of their own settlement. Those proofs were, however, considered sufficient by the register of the local land office, by the Commissioner of the General Land Office on appeal from the register, and by the Secretary of the Interior on appeal from the commissioner. There is no evidence of any fraud or imposition practiced upon them, or that they erred in the construction of any law applicable to the case. It is only contended that they erred in their deductions from the proofs presented; and for errors of that kind, where the parties interested had notice of the proceedings before the Land Department, and were permitted to contest the same, as in the present case, the courts can fur-

nish no remedy. The officers of the Land Department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of preemption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department and, perhaps, under special circumstances, to the President. It may also be and probably is true, that the courts may furnish, in proper cases, relief to a party where new evidence is discovered, which, if possessed and presented at the time, would have changed the action of the land officers; but, except in such cases, the ruling of the department on disputed questions of fact made in a contested case must be taken, when that ruling is collaterally assailed, as conclusive.

In this case, therefore, we cannot inquire into the correctness of the ruling of the Land Department upon the evidence presented of the settlement of Chartrand, the ancestor, or of his heirs. It follows that the patent issued by the United States, taking effect as of the date of such settlement, overrides the patent of the State of Missouri to McPherson, even admitting that, but for the settlement, the land would have been open to selection by the State.

Decree affirmed.

Cited—96 U. S., 535; 98 U. S., 121; 100 U. S., 118; 101 U. S., 475, 519; 104 U. S., 426; 107 U. S., 465; 111 U. S., 291; 5 Dill., 427; 4 Sawy., 318; 6 Sawy., 85, 156; 2 McCrary, 285; 84 Ill., 458; 89 Ohio St., 377; 48 Am. Rep., 467.

THE UNION PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

v.

SAMUEL E. HALL AND JOHN W. MORSE.

(See S. C., 1 Otto, 343-356.)

Terminus of Union Pacific Railroad—mandamus.

1. The railroad bridge over the Missouri River, between Omaha, Neb., and Council Bluffs, Ia., is a part of the Union Pacific Railroad, and the Company is required by law to use it in connection with and as a part of its entire road, as a continuous line connecting with the Iowa roads.

2. The initial point of the Iowa branch of the Union Pacific Railroad was fixed by the Act of Congress on the Iowa bank of the Missouri River.

3. A writ of *mandamus*, to compel the performance of a public duty, may be issued at the instance of a private relator.

[No. 584.]

Submitted Jan. 7, 1876. Decided Feb. 28, 1876.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Mr. A. J. Poppleton, for plaintiff in error:

On the question of the right of private persons to maintain the present proceeding, counsel cited *Washington v. Pettus*, 16 Pick., 105; 429

Ree v. Merchants, etc., Co., 2 B. & Ald., 115; *Hoofner v. Commonwealth*, 28 Pa. St., 108; *People v. Regents*, 4 Mich., 98, 187; *Arbony v. Beams*, 6 Tex., 457; *Langer v. Commissioner*, 25 Me., 291; *People v. Pacheco*, 29 Cal., 212.

Mr. John N. Rogers, for defendants in error.

Mr. Justice Strong delivered the opinion of the court:

This is a proceeding instituted under the Act of Congress of March 8, 1873, 17 Stat. at L., 509, sec. 4, which confers upon the proper Circuit Court of the United States jurisdiction to hear and determine all cases of *mandamus* to compel the Union Pacific Railroad Company to operate its road as required by law. The alternative writ, as amended, commanded the Railroad Company to operate the whole of their road from Council Bluffs westward (including that portion thereof between Council Bluffs and Omaha, and constructed over and across their bridge spanning the Missouri River) as one continuous line for all purposes of communication, travel and transportation; and especially commanded them to start from Council Bluffs their regular through freight and passenger trains westward bound, and to run their eastern bound trains of both descriptions through and over said bridge to Council Bluffs under one uniform time schedule with the remainder of their road, and to desist and refrain wholly from operating said last mentioned portion of said road as an independent and separate line, and from causing freight or passengers bound westward or eastward to be transferred at Omaha, or to show cause why they did not obey the writ.

To the alternative *mandamus* the Railroad Company put in a return, which was met by an answer filed by the relators; and the case was heard by the circuit court on the facts stated in the writ, the return and the answer (the averments of the answer not being controverted), and a peremptory *mandamus* was ordered. It is of this final judgment that the plaintiffs in error now complain.

The obligation of the Union Pacific Railroad Company to operate their road as a continuous line, throughout its entire length, is not denied. The Company is a creature of congressional legislation. It was incorporated by the Act of Congress of July 1, 1862, 12 Stat. at L., 489; and its powers and duties were prescribed by that Act, and others amendatory thereof. By the 12th section it was enacted that the "whole line of the railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one connected, continuous line." A similar requisition was made in the 15th section of the amendatory Act of July 2, 1864, 13 Stat. at L., 356. The contest in the case does not relate to the existence of this duty; it is principally over the question, whether the railroad bridge over the Missouri River, between Omaha in Nebraska and Council Bluffs in Iowa, is a part of the Union Pacific Railroad; for, if it is, there can be no doubt that the Company are required by law to use it in connection with, and as a part of, their entire road, operating all parts together as a continuous line.

The answer to this question must be found in

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the legislation of Congress, and in what has been done under it. By the 1st section of the Act of 1862, the Union Pacific Railroad Company was authorized to construct, maintain and enjoy a continuous railroad and telegraph, with the appurtenances, from a point on the one hundredth meridian of longitude west from Greenwich to the western boundary of the Territory of Nevada. There it was intended to meet and connect with the line of the Central Pacific Railroad Company of California (sec. 8), thus forming a continuous line to the Pacific Ocean. This was the main line. But the same Act made provision also for several eastern connections. The 9th section authorized the Leavenworth, Pawnee and Western Railroad Company of Kansas, now the Kansas Pacific, to construct a railroad from the Missouri River, at the mouth of the Kansas River (on the south side thereof, so as to connect with the Pacific Railroad of Missouri), to the point of western departure of the Union Pacific on the one hundredth meridian. Thus provision was made for an eastern connection by an unbroken line of road to St. Louis on the Mississippi. This was not all. By the 14th section of the Act, the Union Pacific was authorized and required "To construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States * * * so as to form a connection with the lines of the said Company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa." Thus provisions were made for the Iowa eastern branch of the main line. It was doubtless intended to render possible a connection with any railroad that might thereafter be constructed from the western boundary of Iowa eastward. None was then completed; but a railroad was in progress of construction through the State, from its eastern border to the Missouri River.

The 14th section also made provision for another eastern connection. It enacted that whenever there should be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific (Union Pacific) Railroad Company should be authorized and required to construct a railroad and telegraph from said Sioux City, so as to connect with the Iowa branch, or with the main line, at a point not farther west than the one hundredth meridian of longitude.

The scheme of the Act of Congress, then, is very apparent. It was to secure the connection of the main line, by at least three branches, with the Missouri and Iowa Railroads, and with a railroad running eastwardly from Sioux City in Iowa, either through that State or through Minnesota. An observance of this scheme, we think, will aid in considering the inquiry at what place the Act of Congress, and the orders of the President made in pursuance thereof, established the eastern terminus of the Iowa branch. From it may reasonably be inferred that the purpose of Congress was to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the States on the east of the Territory, and to provide for those connections within those States, at points at or near their western boundaries. Thus the northern branch was required to be constructed

from Sioux City (which is in the State of Iowa) westward toward the main line; and the southern branch was authorized to build their railroad from the south side of the Kansas River, at its mouth, so as to connect with the Pacific Railroad of Missouri. If, now, the provisions of the Act respecting the central or Iowa branch be examined, the same purpose is evident. Those provisions are found in the 14th section, and they are as follows:

"And be it further enacted, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of the said Company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa."

This clause contains the only provisions of the Act respecting the eastern terminus of the Iowa branch, and it twice defines that terminus as "a point on the western boundary of the State of Iowa." The legal boundary of the State is the middle of the channel of the Missouri River. 9 Stat. at L., 52. But it is very evident that Congress did not intend that the road should start from a point in the mid-channel of the river. That would be impossible; and, were it possible, it would not carry out the general design of the Act, which, as we have seen, was to provide for connections with the eastern railroads then in existence or contemplated. It is conceded by the counsel of the Company that Congress ought not to be held to have intended to fix the initial point in the mid-channel of the river, exactly on the line which is the legal boundary of the State. Such a construction of the law, it is acknowledged, would be unreasonable, because it would involve the requirement of an impossibility. But, if Congress did not mean to require a construction of the railroad from the imaginary line which is the legal boundary of Iowa—namely: from the mid-channel of the river—they must have intended the initial point to be either on the Iowa shore or on the Nebraska shore. If the Nebraska shore was intended, why was it not mentioned? Why was not the west bank of the Missouri River designated? Or why was not the eastern boundary of Nebraska fixed as the point of departure? Still more, why was Iowa mentioned at all? Or why was the initial point described as a point on the western boundary of Iowa? It is impossible to give a satisfactory answer to these questions, if the eastern or Iowa shore of the river was not intended to be the terminus of the railroad. Unless it was so intended, no reason is found in the Acts of Congress for mentioning Iowa at all. The western shore of the river is no nearer the western legal boundary of Iowa than the eastern shore is; while the latter is, in common understanding, the western boundary of the State. Congress may well be supposed to have used language in accordance with the common understanding. It is common usage to speak of the boundary of a State or county as a river, though the legal boundary may be the middle of

the river; and particularly when anything is to be constructed on such a boundary, which from its nature must be constructed on dry land, would no one understand the place of construction as any other than the shore of the river. It is perfectly legitimate and in accordance with every-day usage to say that a house built in Illinois on the eastern shore of the Mississippi stands on the western boundary of the State, though the legal boundary of the State is the mid-channel of the river. In common understanding, therefore, a point on the western boundary of Iowa would be a point in Iowa on the eastern shore of the Missouri, precisely as a point on the eastern boundary of Nebraska would be understood to be in Nebraska on the western shore of the river. The words "on the boundary of Iowa" are not technical words; and, therefore, they are to be taken as having been used by Congress in their ordinary signification. Instances are not rare in which statutes have been construed, not literally, but in accordance with the common use of the language employed by the law-makers. Authority to construct a railroad or turnpike from A to B, or beginning at A and running to B, is held to confer authority to commence the road at some point within A, and to end it at some point within B. The words "from," "to" and "at" are taken inclusively, according to the subject-matter. *Rez v. Norwich*, 1 Str., 179; *Turnpike Co. v. Coventry*, 10 Johns., 889.

So, in the case of *Mohawk Bridge Co. v. Utica and Schenectady R. R. Co.*, 6 Paige, 554, a similar ruling was made. The City of Schenectady was on the south bank of the Mohawk River, the north bounds of the city being the middle of the channel of the river; yet, it was held that a railroad company authorized to build a railroad "commencing at or near the City of Schenectady, and running thence on the north side of the Mohawk River," was by those words empowered to build a bridge over the Mohawk, and commence their railroad at or within the city. These decisions bear some analogy to the construction given by the circuit court to the phrase "on the western boundary of Iowa," and that construction is the only one consistent with the paramount purpose manifested in the Act of Congress, to provide for connections with the railroads of the States east of Nebraska Territory—a purpose to which we have already referred. Unless the Iowa branch of the Union Pacific was intended to commence on the Iowa shore of the Missouri River, its connection with the Iowa railroads would have been impossible. Those roads could not be extended to the Nebraska shore; for the State of Iowa was without power to authorize the erection of a bridge over the river, or even the establishment of a ferry. We do not propose to enter upon a consideration of the question, whether Congress had power to authorize the construction of railroads within a State; it is not necessary for the present case. Even the appellants would shrink from denying the lawful existence of their bridge. What is to be sought now is the intention of Congress, not its power. Did Congress intend the place of connection to be on the eastern shore of the river? That they did is manifest, if they intended any connection; for

no other was possible, either with or without the co-operation of Iowa.

In accordance with this understanding of the Act of 1862 was the action of the President. The 14th section of the Act required the Company to construct the Iowa branch from a point on the western boundary of Iowa, to be fixed by the President of the United States. In discharging the duty thus imposed, the President, by an executive order, dated November 17th, 1868, fixed so much of the western boundary of the State of Iowa as lies between the north and south boundaries of the United States township within which the City of Omaha is situated as the point from which the line of railroad and telegraph should be constructed. This designation was, in one particular, indefinite. While it adhered to the western boundary of Iowa, it left undetermined at what place on that boundary the initial point should be, except that it should be somewhere between the north and south boundaries of a township, those boundaries being six miles apart. The President, therefore, on the 7th day of March, 1864, by a second executive order, made a more definite location. By that order he designated and established the point from which the Railroad Company was authorized to construct the road as a point "on the western boundary of Iowa east of and opposite to the east line of section 10, in township 15, north of range 13, east of the 6th principal meridian, in the Territory of Nebraska." Section 10 is a fractional section, its eastern boundary being the Missouri River. That the President understood this designation as fixing the point on the eastern shore of the river, and within the State of Iowa, is manifest from the message which, two days afterwards, he sent to Congress, accompanying a copy of his official orders, in which he declared that the orders fixed the point on the western boundary of Iowa, "within the limits of the township in Iowa opposite the Town of Omaha, in Nebraska." And such appears to be the plain meaning of the executive orders. The point could not have been "east of and opposite to the east line of section 10, in township 15," the section spoken of, if it was on the western shore of the river. It would then have been in Nebraska. The designation by the President was thus in strict conformity with the Act of Congress; for, whenever that Act spoke of the terminus of the Iowa branch with reference to its location, it described it, not as being in Nebraska, not even as being in the Missouri River, but as on the western boundary of Iowa.

Thus far we have confined our attention to the Act of 1862, and to the President's action under it. From that Act alone we have deduced the conclusion that the Company was authorized and required to build their railroad to the Iowa shore. That authority included within itself power to build a bridge over the Missouri. No express grant to bridge the river was needed. Whatever bridges were necessary on their line were as fully authorized as the line itself; and the Company were as much empowered to build one across the Missouri as they were across the Platte or any other river intersecting the route of their road. *People v. R. R. Co.*, 15 Wend., 130; *Springfield v. R. R. Co.*,

4 Cush., 63; *Mohawk Br. Co. v. Utica & Schenectady R. R. Co.*, *ut supra*.

But the amendatory Act of 1864 is not to be overlooked. It is to be regarded in connection with the Act of 1862, and interpreted as a part of it. By its 9th section the Company were expressly authorized to construct bridges over the Missouri and other rivers which their road might pass in its course, for the convenience of their road; and the Act declared this authority to be given to enable the Company to make convenient and necessary connections with other roads. This enactment may not have been necessary. The power may have been conferred upon the Union Pacific Railroad Company by the Act of 1862; and we think it was. But, whether necessary or not, it shows clearly that Congress had in view the construction of the railroad to the Iowa shore of the river. No bridge could be constructed without making use of the Iowa shore.

It is well to observe here that the authority was given to the Company as a railroad company, and not as a bridge company. The bridge was for the convenience of their road, and to enable them to connect it with other roads. They could build it for no other uses. They were not authorized to use it for other purposes than those of their road. They were not allowed to charge rates of toll which they did not charge upon other portions of their line. If they acquired such a right, it was by subsequent legislation—by the Act of 1871, to which we shall refer hereafter; but if, under the Acts of 1862 and 1864, the Company were authorized to build a railroad bridge across the river, and if such bridge was a part of their road, and not another railroad, the conclusion is irresistible that their road was intended to have its eastern terminus on the Iowa shore of the river.

It is no answer to this to urge that Congress could not have intended to invade a State by chartering a company to build a railroad in part within the state limits. The stubborn fact remains, that Congress did authorize the building of a railroad bridge on land within the territorial limits of the State, and, as necessarily incidental to that, a railroad upon the necessary approaches to the bridge. So, also, Congress authorized building a railroad from St. Louis City, in Iowa, across the Missouri River westward. The statute does show a plain intention that the Company's railroad should enter the State under its authority; and the 12th section enacted what should be done whenever the route of the road should cross the boundary of any State or Territory, and authorizes the President of the United States, in case the companies met there and disagreed respecting the location, to determine it.

Our attention has been called to other clauses in the Acts of 1862 and 1864, in which the road is spoken of as from the Missouri River to the Pacific coast, or to the navigable waters of the Sacramento, or from Omaha, as indicating that the eastern terminus was intended to be Omaha, or the western shore of the Missouri River. But these clauses have other objects in view than designating the terminus of the road. They are descriptive of the road, but not of its beginning or ending. Whenever the attention of Congress was turned to the eastern terminus alone, and the purpose was to determine its location, there

is no variance in the language employed. It is always "a point on the western boundary of Iowa." The different forms of expression employed in other sections and for other purposes can have no bearing upon the question.

Again; it is claimed that the contemporaneous construction given to the charter of the Company, by its officers and by the officers of the government, tends to show that the terminus was fixed by the statute on the Nebraska side of the river. It must be conceded, that, in a case where the interpretation of an instrument is doubtful, the practical construction given to it by the parties is of weight. But we do not discover that the United States Government or its officers ever acted upon the theory that the eastern terminus of the road was on the western shore of the river. The officers of the Company asserted it for a time, it is true, but not in their practical intercourse with the National Government. Indeed, it never became a practical question until the bridge was erected; and from that time to the present the Government has asserted that the true terminus of the road was fixed on the Iowa shore. There is nothing, we think, in any contemporaneous construction given to the Acts of Congress, which ought to have any weight in determining the question now before us.

Our conclusion, therefore, is, that the initial point of the Iowa branch of the Union Pacific Railroad was fixed by the Act of Congress on the Iowa bank of the Missouri River.

If we are correct in this conclusion, it seems to be clear that the bridge over the river, built by the Railroad Company, is a part of their railroad, and required by law to be so operated. It was commenced in 1869 under the Acts of 1862 and 1864. These Acts were the only authority the Company had at the time of its commencement for building it. It is a railroad bridge, a continuation of the line west of the river; and it connects the road with its required eastern terminus. The Acts chartering the Company manifest no intention to distinguish between the bridge over the Missouri River and other bridges on the line of their road. If it is not a part of their road, neither is any bridge between the Missouri and the western boundary of Nevada; for the power to build all bridges was given in the same words.

It has been argued, however, that the bridge is not a part of the Company's railroad, because it is not located opposite section 10, east of and opposite to which, on the western boundary of Iowa, the President fixed the terminus. It is, however, the only bridge the Company has extending their road to the western boundary of Iowa; and clearly they have no authority to build any other. True, it is not opposite section 10; but the Company has taken up its road from that section, and now it comes to the river where the bridge is actually constructed. Having abandoned their road, so far as it extended above that point; having commenced their bridge where it is; having applied to Congress for power to mortgage it, and for special power to levy tolls and charges for the use of it; and having obtained those powers, they are not at liberty now to assert that they have located their bridge at the wrong place. There is nothing, either in the Act of 1862 or 1864, or in that of February 24, 1871, 16 Stat. at L., 480, which

empowers them to build more than one bridge over the Missouri for the Iowa branch; and the latter Act contains an implied recognition of their right under the former Acts to build their bridge on its present location. There is no intimation in it of a distinct bridge franchise. It grants no power to build a bridge. Its main purpose, manifestly, was to give the Company additional means and privileges for the completion of a structure already authorized, not to enable them to construct a new and independent road. To hold that the bridge is not a part of the road would defeat the plain object Congress had in view in 1862 and 1864—a continuous line for connection with the Iowa roads. It would be allowing the connection to be made in Nebraska, instead of on the western boundary of Iowa, when the Act of 1871 expressly declared that nothing therein should be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it was then fixed by existing laws. Indeed, that proviso was quite unnecessary if the bridge was not thought to be a part of the railroad connecting the other part with the western boundary of Iowa.

Holding then, as we do, that the legal terminus of the railroad is fixed by law on the Iowa shore of the river, and that the bridge is a part of the railroad, there can be no doubt that the Company is under obligation to operate and run the whole road, including the bridge, as one connected and continuous line. This is a duty expressly imposed by the Acts of 1862 and 1864, and recognized by that of 1871. What this means it is not difficult to understand. It is a requisition made for the convenience of the public. An arrangement, such as the Company has made, by which freight and passengers destined for or beyond the eastern terminus are stopped two or three miles from it and transferred to another train, and again transferred at the terminus, or by which freight and passengers going west from the eastern end of the line must be transferred at Omaha, breaks the road into two lines, and plainly is inconsistent with continuous operation of it as a whole. If not, the injunction of the statute has no meaning. The *mandamus* awarded in this case, therefore, imposes no duty beyond what the law requires.

Such is our opinion of the merits of this case. A single objection made and urged against the form of proceeding remains to be considered. The appellants contend that the court erred in holding that Hall and Morse, on whose petition the alternative writ was issued, could lawfully become relators in this suit on behalf of the public without the assent or direction of the Attorney-General of the United States, or of the district attorney for the District of Iowa. They were merchants in Iowa, having frequent occasion to receive and ship goods over the Company's road; but they had no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally. The question raised by the objection, therefore, is whether a writ of *mandamus* to compel the performance of a public duty may be issued at the instance of a private relator. Clearly in England it may. Tapping, on *Mandamus*, p. 28, asserts the rule in that

country to be, that, "In general, all those who are legally capable of bringing an action are also equally capable of applying to the Court of King's Bench for the writ of *mandamus*." This is true in all cases, it is believed, where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest; and it is equally true, we think, in case of applications to compel the performance of duties to the public by corporations. In *Rex v. R. Co.*, 2 Barn. & Ald., 646, a private individual, without any allegation of special injury to himself, obtained a rule upon the company to show cause why a *mandamus* should not issue commanding them to lay down again and maintain part of a railway which they had taken up. Under an Act of Parliament, the railway was a public highway; and all persons were at liberty to pass and repass thereon, with wagons and other carriages, upon payment of the rates. What the prosecutor complained of was the loss by the public, and particularly by the owners of certain collieries (of which he does not appear to have been one), of the benefit of using the railway taken up. The writ was awarded. It was not even claimed that the intervention of the Attorney-General was need. Other cases to the same effect are numerous. *Clarke v. Canal Co.*, 6 Ad. & Ell. (N. S.), 898; 1 Chit., 700.

In this country there has been diversity of decision upon the question whether private persons can sue out the writ to enforce the performance of a public duty, unless the non-performance of it works to them a special injury; and in several of the States it has been decided that they cannot. An application for a *mandamus*, not here a prerogative writ, has been supposed to have some analogy to a bill in equity for the restraint of a public nuisance. Yet, even in the supposed analogous case, a bill may be sustained to enjoin the obstruction of a public highway, when the injury complained of is common to the public at large, and only greater in degree to the complainants. It was in *Pa. v. Wheeling Br.*, 18 How., 518, where the wrong complained of was a public wrong, an obstruction to all navigation of the Ohio River.

The injury to the complainants in that case was no more peculiar to Pennsylvania, than is the injury to Hall and Morse in this, peculiar and special to them.

There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law officer. *People v. Collins*, 19 Wend., 56; *Pike Co. v. State*, 11 Ill., 202; *Ottawa v. People*, 48 Ill., 233; *Hamilton v. State*, 8 Ind., 452; *Hall v. People*, 57 N. Y., 307; *People v. Halsey*, 37 N. Y., 344; *Iowa v. Judge of Marshall Co.*, 7 Iowa, 186; *State v. Railway*, 38 N. J. L., 110; *Watts v. Carroll Police Jury*, 11 La. Ann., 141; see, also, Dillon, Mun. Corp., sec. 695, and High, Extr. Rem., secs. 421, 422; *Cannon v. Janvier*, 3 Houst. (Del.), 27; *State v. Railway* [*supra*]. The principal reasons urged against the doctrine are, that the writ is prerogative in its nature—a reason which is of no force in this country, and no longer in England—and that it exposes a defendant to be

1.—Not found as cited. Ed.

harassed with many suits. An answer to the latter objection is, that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted.

There is also, perhaps, a reasonable implication that Congress, when they authorized writs of *mandamus* to compel the Union Pacific Railroad Company to operate their road according to law, did not contemplate the intervention of the Attorney-General in all cases. The Act of 1873 does not prescribe who shall move for the writ, while the Attorney-General is expressly directed to institute the necessary proceedings to secure the performance of other duties of the Company. For these reasons, we think, the circuit court did not err in holding that Hall and Morse were competent to apply for the writ in this case.

The decree of the Circuit Court is affirmed.

Mr. Justice Bradley, dissenting:

I am obliged to dissent from the judgment of the court in this case. The Missouri River is, by common acceptance, the western boundary of Iowa; and the fair construction of the charter of the Union Pacific Railroad Company, which adopts that boundary as its eastern terminus, is, that the road was to extend from the Missouri River westwardly. The subsequent express authority given to construct a bridge across the river, in my judgment, confirms this view of the subject; and as a *mandamus* is a severe remedy, requiring a clear right and clear duty to support it, I think it ought not to be granted in this case, especially as it requires the Company to use the bridge as a part of their continuous line with all their trains, which may impose much inconvenience on them, without corresponding benefit to the public.

Cited—4 Dill., 499; 28 Hun, 552; 85 Ohio St., 384; 70 Mo., 115; 47 Md., 154; 28 Am. Rep., 447.

WALTER N. HALDEMAN ET AL., *Pliffs. in Err.*,

v.
UNITED STATES.

(See S. C., 1 Otto, 584-586.)

Judgment of nonsuit—effect—when a bar—dismissed by agreement.

1. A judgment, that the said suit is not prosecuted and be dismissed, is nothing more than judgment of nonsuit, although the customary technical language is not used, and does not preclude the institution and maintenance of a subsequent suit.

2. There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively.

3. The general entry of the dismissal of a suit by agreement is evidence of an intention not to abandon the claim on which it is founded; but to preserve the right to bring a new suit thereon, if it becomes necessary.

[No. 157.]

Argued Feb. 18, 1876. Decided Feb. 28, 1876.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

NOTE.—Consequences of a nonsuit or dismissal of complaint. Distinction in actions for equitable relief. A nonsuit is no bar to another action for same cause. See note to *Homer v. Brown*, 57 U. S. (16 How.), 354. See 1 OTTO.

The case is stated by the court.

Messrs. B. H. Bristol, Harlan and Wilson, for plaintiffs in error, cited, as to the 1st, 2d and 4th pleas, *Harper v. Graham*, 20 Ohio, 105; Jacob, L. Dic., "Retraxit;" Bouvier, Do.; *Harrie v. Tiffany*, 8 B. Mon., 225; 3 Thomas, Coke, 550; Bac. Abr., Non-suit, A.

As to 8d plea, *Bk. of Commonwealth v. Hopkins*, 2 Dana, 895; *Jarboe v. Smith*, 10 B. Mon., 257; *Merrill v. Campbell*, 47 Cal., 545; *Gibbs v. Ralph*, 11 M. & W., 805.

Mr. Edwin B. Smith, Asst. Atty-Gen., for defendant in error.

Mr. Justice Davis delivered the opinion of the court:

This is an action of debt on bond conditioned for the performance of official duty by Halde- man, as Surveyor of the Customs and Depos- itary of the Public Moneys, at Louisville, Ken- tucky. In discharge of the action, four pleas of judgment already recovered for the same cause of action were interposed. The court be- low sustained demurrers to each of these pleas, and the correctness of this ruling presents the only point in the case.

It is a general rule that a plea of former re- covery, whether it be by confession, verdict or demurrer, is a bar to any new action of the same or a like nature for the same cause. This rule is in obedience to the policy of the law, which requires an end to the litigation after a trial on the merits. But there must be at least one trial of a right between the parties before there can be said to be an end of the dispute, and before a former judgment can avail as a bar to another suit. Conceding that this suit is between the same parties as well as for the same subject-matter as the former one, are the United States barred from a recovery by reason of anything alleged in the pleas? The first, second and fourth pleas are not essentially dif- ferent. In each the judgment relied on is, "That the said suit is not prosecuted, and be dismissed." This entry is nothing more than the record of a nonsuit, although the technical language applicable to such a judgment is not used. But the counsel for the plaintiffs in error deny that this is the effect of the order, and insist that the pleas present a case of *re- traxit*, by which the plaintiff forever loses his action, because the United States voluntarily announced to the court, that if the defendants would do what they were not bound to do, pay the costs, it would dismiss the suit. This announcement does not imply that the United States had no cause of action, or, if they had, they intended to renounce it. It implied noth- ing more than a willingness to receive the costs and permit the dismissal of that particular ac- tion. There is no implication that the cause of action was adjusted. Nonsuits are fre- quently taken, on payment of costs by the ad- verse party, in order to arrange the controversy out of court, but it has never been supposed that the effect of such a proceeding was to pre- vent the institution and maintenance of a sub- sequent suit in case of failure to settle the mat- ter in dispute. The defendants, in consenting to pay the costs, on the withdrawal of the suit, gained delay, if nothing more, and this, doubt- less, served their purpose; but the idea of turn- ing this withdrawal into an intentional aban-

donment of the cause of action is an after thought.

In the third plea it is alleged that the former suit was identical with this, and was "dismissed agreed" by the judgment of the court. If this plea is true the others cannot be, for they recite the judgment differently; and there could have been but one record of the judgment, as there was but one suit. In general, a defendant may in different pleas state as many substantially different grounds of defense as he may be advised is material, but this rule has no application to this case. There is but one defense presented to his action, and that required only a single plea. More than this was not only unnecessary, but wrong practice. It is quite apparent, from the language of the record in the fourth plea, the only one which purports to give it in full, that there was no such entry of judgment as stated in the third plea, and on this account it should have been rejected. But even if it truly recites the entry of judgment, it is still bad. There must have been a right adjudicated or released in the first suit in order to constitute it a bar, and this must appear affirmatively. The plea does not aver this, nor does it state any fact from which it can be inferred that the parties had any contest at all about their interests. There was neither trial nor decision, nor averment, even, that the parties had by their agreement adjusted the matter in controversy. Whatever may be the legal effect given in the courts of Kentucky to a judgment entry "dismissed agreed," it is manifest that the words do not of themselves import any agreement to terminate the controversy, nor do they imply an intention to merge the cause of action in the judgment. Suits are often dismissed according to the agreement of the parties, and a general entry made to that effect, without incorporating the agreement in the record, or even placing it on file. This argument may settle nothing or it may settle the entire dispute. If the latter, in order to avail as a bar, there must be proper statement to that effect. But the general entry of the dismissal of a suit by agreement is no evidence of an intention to abandon the claim on which it is founded, but rather of a purpose to preserve the right to institute a new suit if it becomes necessary. It is a withdrawal of a suit on terms. These terms may be more or less important. They may refer to costs or they may embrace a full settlement of the contested points.

If they are sufficient to estop the plaintiff, the plea must show it.

•This it does not do, and this plea is like the others, bad.

Judgment affirmed.

I, James H. McKenney, Clerk of the Supreme Court of the United States, hereby certify that the foregoing is a true copy of the opinion of the Court in the case of *Walter N. Haldeman et al., Plfs. in Err., v. The U. S.*, No 157 of October Term, 1875, as the same remains upon the official records of the said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court at the City of Washington, this thirty-first day of January, A. D. 1885.

JAMES H. MCKENNEY,
Clerk U. S. Sup. Ct.

HENRY H. RAYMOND, *Plf. in Err.*,

v.

WILLIAM M. THOMAS.

(See S. C. 1 Otto. 712-716.)

Void military order—limit of military power.

1. The order of General Canby of May 2, 1863, which wholly annulled a decree in equity regularly made by a competent judicial officer of South Carolina, in a plain case clearly within his jurisdiction, and where there was no pretense of any unfairness, or of any purpose to wrong or oppress, or of any indirection whatsoever, was void.

2. It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires.

[No. 146.]

Argued Feb. 10, 11, 1876. Decided Feb. 28, 1876.

IN ERROR to the Supreme Court of the State of South Carolina.

The case is stated by the court.

Messrs. P. Phillips and Jas. B. Campbell, for plaintiff in error.

Mr. W. W. Boyce, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

The facts in this case, as disclosed in the record, are somewhat involved and complicated. So far as it is necessary to consider them for the purposes of this opinion, they are not voluminous.

On the 25th of August, 1863, Mary Raymond bought from Thomas, the defendant in error, a small house and lot situated in Greenville, South Carolina, for which she gave him her note for \$7,000, payable six months after the ratification of peace between the Confederates and the United States, or before, at her option, with annual interest from the first day of September, 1863. The premises were conveyed at the time of the sale, and the grantee gave back a mortgage to secure the payment of the note.

On the 28th of May, 1866, Thomas filed his bill in the Court of Common Pleas of Greenville County to foreclose the mortgage. The vendee answered. The case was heard in July, 1866, before *Chancellor Johnson*. The chancellor held that the note was intended by the parties to be payable in Confederate money; and that, in view of all the circumstances, the amount of principal equitably due upon it was \$2,500. The case was referred to a master to compute the aggregate principal and interest due upon this basis. This decree, upon the appeal of Thomas, was affirmed by the Court of Errors of the State at its December Term, 1867. On the 25th of January, 1868, *Chancellor Carroll*, sitting in the Common Pleas, decreed that the amount due in conformity to the master's report was \$3,265.62; that, unless that sum was paid as directed, the commissioner should sell the premises; and that, if the proceeds were insufficient to pay the debt and costs, the complainant might issue execution for the balance.

On the 28th of May following, General Canby issued an order whereby he annulled this decree. The order contains a slight error in the description of the decree; but the meaning of the order is clear. The discrepancy is, therefore, immaterial. On the 24th of December,

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1868, the military order *non obstante*, the commissioner reported that he had sold the premises for \$1,005. On the 2d of January, 1869, Mary Raymond filed her bill in the Court of Common Pleas of Charleston County, setting forth the facts above stated; and further, that the sheriff of that county was about to proceed to collect from her the balance still due upon the decree, amounting to \$2,653.26. She prayed that Thomas and all others be perpetually enjoined from further enforcing the decree. The court decreed accordingly. Subsequently Gailard (the purchaser) and Thomas answered, and moved to dissolve the injunction. In July, 1869, this motion was overruled, and the injunction again ordered to be made perpetual. An appeal was taken to the Supreme Court of the State, but failed for want of prosecution.

In December, 1870, Thomas obtained leave to amend his original bill of foreclosure. He did so, setting forth, among other things, that the original defendant, Mary Raymond, had died, and that Henry H. Raymond had been appointed her executor, and making him a party. In due time he answered, denying that he was either executor or administrator of the deceased, and insisting that he was not bound to answer, and that no decree could be taken against him. He admitted that he was in possession of her estate, and averred that he was ready to pay all her just debts. The amended bill and this answer set forth other things not necessary to be repeated.

The case in this new aspect came on to be heard. It was decreed that the sale of the mortgaged premises be confirmed, that the purchaser have a writ of assistance to enable him to obtain possession, and that the complainant have leave to enter up a judgment against the defendant for the balance due him, and interest and costs, as before decreed. Raymond thereupon removed the case by appeal to the Supreme Court of the State. That court, at the April Term, 1873, affirmed the decree of the lower court. This writ of error was thereupon sued out by Raymond; and the judgment of the Supreme Court is thus brought before us for review.

Outside of the record, our attention has been called to an Act of the Legislature of South Carolina of the 2d of September, 1868, touching certain military orders therein mentioned. The Act does not embrace or affect the order of General Canby in question in this case.

Nothing more need be said in regard to the Act.

The only point insisted upon here by the counsel for the plaintiff in error is the order of General Canby of the 2d of May, 1868, and its disregard by the Supreme Court of South Carolina in the judgment before us. The validity of the order is denied by the defendant in error. Our remarks will be confined to that subject.

The war between the United States and the insurgents terminated in South Carolina, according to the judgment of this court, on the 2d of April, 1868. *The Protector*, 12 Wall., 701 [79 U. S., XX., 464]. The National Constitution gives to Congress the power, among others, to declare war and suppress insurrection. The latter power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently rightful authority

See 1 Otto.

to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress. *Stewart v. Kahn*, 11 Wall., 506 [78 U. S., XX., 179].

The close of the war was followed by the period of reconstruction, and the laws enacted by Congress with a view to that result.

These laws are the Act of March 2, 1867, 14 Stat. at L., 428; the Act of July 19, 1867, 15 Stat. at L., 14, and the Act of June 25, 1868, 15 Stat. at L., 73. The two Acts first mentioned defined the powers and duties of the military officers placed in command in the several States lately in rebellion. The Act of June 25, 1868, provided, among other things, that, whenever the Legislature of South Carolina should ratify the Fourteenth Amendment to the Constitution of the United States, she should be again admitted to representation in Congress; and that it should be the duty of the President, within ten days after receiving official information of the ratification, to issue a proclamation announcing the fact. Such a proclamation was issued on the 11th of July, 1868, 15 Stat. at L., 703. This replaced the State in her normal relations to the Union. Nothing further was necessary, but the elections provided for, which speedily followed, to render her rehabilitation complete.

We have looked carefully though the Acts of March, 2, 1867, and July 19, 1867. They give very large governmental powers to the military commanders designated, within the States committed respectively to their jurisdiction; but we have found nothing to warrant the order here in question. It was not an order for mere delay. It did not prescribe that the proceeding should stop until credit and confidence were restored, and business should resume its wonted channels. It wholly annulled a decree in equity regularly made by a competent judicial officer in a plain case clearly within his jurisdiction, and where there was no pretense of any unfairness, of any purpose to wrong or oppress, or of any indirection whatsoever.

The meaning of the Legislature constitutes the law. A thing may be within the letter of a statute, but not within its meaning; and within its meaning, though not within its letter. *Stewart v. Kahn* [*supra*].

The clearest language would be necessary to satisfy us that Congress intended that the power given by these Acts should be so exercised.

It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act, is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires. *Mitchell v. Harmony*, 13 How., 115; *Warden v. Bailey*, 4 Taunt., 67; *Mostyn v. Fabrigas*, 1 Cowp., 161; *S. C.*, 1 Smith, L. C., pt. 2, 934. Viewing the subject before us from the stand-point indicated, we hold that the order was void.

This is the only federal question presented for our consideration. As the Supreme Court of the State decided it correctly our jurisdiction terminates at this point; we can look no further into the case.

The judgment is affirmed.

PETER B. AMORY, *Plff. in Err.*,

v.

SAMUEL B. AMORY ET AL.,

SAME v. SAME.

(See S. C., 1 Otto, 356, 357.)

Cause appealed only for delay—practices.

1. This court cannot dismiss a case, on motion, simply on the ground that it has been brought here for delay only.

2. Neither can this court advance a cause for argument, for the reason that it has no merits.

3. This court can adjudge damages where a writ of error has been sued out merely for delay, and this power will be exercised in all cases where its jurisdiction has been invoked merely to gain time.

[Nos. 508, 509.]

Submitted Feb. 28, 1876. Decided Mar. 20, 1876.

IN ERROR to the Supreme Court of the State of New York.

On motion.

Messrs. Fullerton, Knox & Crosby and Matt. H. Carpenter, for defendants in error.

Messrs. George F. Edmunds and W. T. Birdsall, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The motions to dismiss and advance these causes are denied.

We cannot dismiss a case on motion simply because we may be of the opinion that it has been brought here for delay only. Both parties have the right to be heard on the merits; and one party cannot require the other to come to such a hearing upon a mere motion to dismiss. To dismiss under such circumstances would be to decide that the case had no merits. Neither can we advance a cause for argument, for the reason that we may think it has no merits. Further argument may show the contrary.

We can adjudge damages, under sec. 1010, R. S. and Rule 23, in all cases where it appears that a writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals and frivolous writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time.

JOHN W. MORSELL, MICHAEL CALLAN
ET AL., *Appls.*,

v.

THE FIRST NATIONAL BANK OF WASHINGTON.

(See S. C., 1 Otto, 357-362.)

Judgment no lien on trust property.

A judgment at law is not a lien upon real estate in the City of Washington which, before the judgment was rendered, had been conveyed to trustees with a power of sale, to secure the payments of the debts of the grantor described in the deed of trust.

[No. 162.]

Argued Feb. 23, 24, 1876. Decided Mar. 20, 1876.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. R. K. Elliott and J. J. Johnson, for appellants:

By the common law, which was the law of Maryland in this particular, at the time of the cession of a portion of its territory, for the seat of the Federal Government, an equity of redemption in lands was not liable to execution at law, on a judgment. It has been so held by this court and in England, under the same law, and in several of the States.

Van Ness v. Hyatt, 13 Pet., 294; *S. C.*, 5 Cranch, C. C., 127; *Stelle v. Carroll*, 12 Pet., 201; *Bk. v. Guttschlick*, 14 Pet., 19; *Smith v. McCann*, 24 How., 401 (65 U. S., XVI., 715); *Sawyer v. Morte*, 3 Cranch, C. C., 331; *Lyder v. Dollond*, 1 Ves., Jr., 431; *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 2 Bos. & P., N. R., 461; *Piatt v. Oliver*, 2 McLean, 269; *Hill v. Smith*, 2 McLean, 446; 4 Kent, Com., 160, n. a.; *Eppes v. Randolph*, 2 Call (Va.), 125.

The Statute of 5 Geo. 11, ch. 7, in force in Maryland at the time of the cession, merely gave the right to creditors of judgment debtors in the colonies to subject "the houses, lands, negroes and other hereditaments and real estates to the satisfaction of judgments, the same as personal estates, etc."

Alexander's British Stat., 716.

This was held to apply only to the legal estate in land and not to an equity of redemption.

Van Ness v. Hyatt (*supra*), which agrees with the English construction. *Plunket v. Penson*, 2 Atk., 292; *Shirley v. Watts*, 3 Atk., 200; *Burden v. Kennedy*, 3 Atk., 739.

Hence, the Act of the Maryland Legislature of 1810, subsequent to the cession, subjecting equitable estates in lands in that State to levy and sale under *fieri facias*.

Md. Code, art. 83, sec. 1.

Mr. Enoch Totten, for appellee:

The judgment of the Bank, and that of Means, Skinner & Co., having been rendered and docketed before the deed of trust of Mar. 1, 1871, are entitled to priority over it. A judgment constitutes a lien on an equity of redemption in the District of Columbia, from the day of its rendition.

Powell, Mort., 461; Coote, Mort., 31, 516; *Lee v. Stone*, 5 G. & J., 19; *Ford v. Philpot*, 5 H. & J., 315; *Symmes v. Symonds*, 4 Bro. P. C., 328; *Haleys v. Williams*, 1 Leigh, 140; *Coutts v. Walker*, 2 Leigh, 268; *Campbell v. Morris*, 3 Har. & McH., 535; *Taylor v. Thomson*, 5 Pet., 357; *Burton v. Smith*, 13 Pet., 483; *Pratt v. Law*, 9 Cranch, 496.

By virtue of the Act of George II., ch. 7, sec. 4, "Houses, lands, negroes and other hereditaments and real estate" are made "liable to and chargeable with all just debts" of the debtor in Maryland and the District of Columbia. This statute was held to authorize the sale of lands on *fieri facias*, and to create a lien upon real estate.

Alex. Brit. Stat., 716 n.; *Taylor v. Thomson* (*supra*).

In Virginia, as in England, the right to take out an *elegit* created a lien upon the lands of the debtor. The writ of *elegit* commands the officer to deliver to the plaintiff a moiety of all the lands and tenements whereof the debtor, at the time of obtaining the judgment, or at any time afterwards, was seised. *Burton v. Smith*.

The judgment became a lien upon an equity of redemption, as well as upon a fee simple estate.

Haleys v. Williams; Coutts v. Walker; Burton v. Smith; Campbell v. Morris; Ford v. Philpot (supra).

Mr. Justice Swayne delivered the opinion of the court:

The question presented for our determination in this case is, whether a judgment at law is a lien upon real estate in the City of Washington, which, before the judgment was rendered, had been conveyed to trustees with a power of sale to secure the payment of the debts of the grantor described in the deed of trust.

The facts, so far as it is necessary to state them, are few and simple:

On the 4th of November, 1867, the appellant, Morsell, executed a deed of trust to Flodoardo Howard to secure the payment of certain promissory notes held by the *cestuis que trust*, as set forth in the deed.

On the 21st of October, 1869, Morsell executed a like deed to Frederick W. Jones and William R. Woodward to secure the payment to the Co-operative Building and Deposit Association of the sum of \$3,050 and future advances.

On the 24th of January, 1871, the appellee, the First National Bank of Washington, recovered a judgment against Morsell for \$800, with interest from the 17th of May, 1869, and costs. Execution was issued upon this judgment, and returned *nulla bona*.

On the 10th of February, 1871, Means, Skinner & Co. recovered a judgment against Morsell for \$267.68, with interest as specified, and costs. Execution was returned *nulla bona* also upon this judgment.

On the 1st of March, 1871, Morsell executed to Frederick W. Jones and Joseph R. Edson, another deed to secure the payment to the association above mentioned of the sum of \$1,060 and future advances.

All these deeds were of the same premises—to wit: lot No. 44, in reservation of No. 10, in the City of Washington.

Advances were made to Morsell by the association named from time to time, after the execution of the deed of trust of the 21st of October, 1869, to the amount, in the aggregate, of \$2,950. The latest advance was one of \$500, made on the 11th of January, 1871. The entire amount claimed to be secured by this deed was, therefore, \$6,000.

The amount secured to the association by the deed of the 1st of March, 1871, was \$1,500. The latest advance under this deed was made on the 27th of April, 1871. There is no controversy as to these particulars.

On the 22d of September, 1871, the bank, in behalf of itself and such other judgment creditors of Morsell as might choose to come in and be made parties, filed this bill. It was subsequently amended in the prayer. It brought the proper parties before the court, and prayed that the premises described in the deeds might be ordered to be sold, the proceeds be brought into court, and the fund distributed according to the rights of the parties.

Means, Skinner & Co., by a petition, came in under this bill. The premises were sold pursuant to a decree, and yielded, after deduct-

ing costs and charges, the sum of \$8,235.22 for distribution. The fund was held subject to the further order of the court. No question was made as to the preference claimed for the amount due to the *cestuis que trust* under the deed to Howard. But the balance left after discharging that liability was insufficient to pay the amount due to the association, laying the judgments out of view. Hence a controversy arose between the association and the judgment creditors, each party claiming priority of payment out of the fund. The auditor of the court, to whom the case was referred, reported in favor of the association. The other parties excepted. The court in General Term held that the association was entitled to priority to the extent of \$6,000, the amount secured by the deed of trust of the 21st of October, 1869; and that the judgments were to be next in the order of payment, both being prior in date to the last deed of trust. This left nothing applicable to the debt secured by the latter. The association thereupon removed the case by appeal to this court.

The "Act concerning the District of Columbia," of the 27th of February, 1801, 2 Stat. at L., 103, declared, "That the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of said District which was ceded by that State to the United States and by them accepted as aforesaid."

A part of the laws so adopted was the common law. *Van Ness v. Hyatt*, 23 Pet., 298. It was well settled in the English jurisprudence, that, according to the common law, no equitable interest in property of any kind was liable to execution. *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 5 Bos. & P. (N. R.), 461; *Lyster v. Dolland*, 1 Ves., Jr., 481.

Judgments by the common law were not liens upon real estate. The lien arose from the power to issue a writ of *elegit*. That power was given by the statute of Westminster, C., 18, 13 Ed. I. The right to extend the land fixed the lien upon it. *Massingill v. Downs*, 7 How., 765; *Shrew v. Jones*, 2 McLean, 80; *U. S. v. Morrison*, 4 Pet., 186; *U. S. v. Winston*, 2 Brock., 252; *Ridge v. Prather*, 1 Blackf., 401.

If the judgment debtor died after the *elegit* was executed upon his lands, and before the judgment was satisfied, a court of equity, upon being applied to, would decree a sale of the land upon which it had been executed, and payment of the judgment out of the proceeds. *Stileman v. Ashdown*, 2 Atk., 477, 607; *Tyndale v. Warre*, Jac., 212. The same principle was adopted by Lord Redesdale into the equity jurisprudence of Ireland. *O'Gorman v. Comyn*, 2 Sch. & L., 186; *O'Fallon v. Dillon*, 2 Sch. & L., 18.

The reason why lands were not liable to be taken in execution at common law is thus stated by Bacon, 2 Bac. Abr., Execution, A: "The lands were not liable because they were obliged to answer the duties of the feudal lord, and a new tenant could not be forced upon him without his consent in the alienation; and the person was not liable because he was obliged by the tenure to serve the King in the wars, and at home the several lords, according to the distinct nature of the tenure."

The premises in question are situated in that

part of the District of Columbia ceded by Maryland to the United States. Our attention has been called to no statute passed by Maryland before the cession, or by Congress since, which affects the question before us. We assume that there is none. That question has been definitively settled by this court. In *Van Ness v. Hyatt, supra*, it was held, after a very elaborate examination of the subject, that, according to the laws of Maryland at the time of the cession, the equity of redemption of a mortgagor could not be sold under execution upon a judgment against him.

In *Bk. v. Gutschlick*, 14 Pet., 19, where the controversy involved a deed of trust of a lot in the City of Washington, it was said, "The only right of the grantor in the deed is the right to whatever surplus may remain, after the sale, of the money for which the property sold." It is clear that there could be no lien of a judgment upon such a chose in action, as well as that it could not be sold upon execution. The case of *Smith v. McCann*, 24 How., 398 [65 U. S., XVI., 714], is an instructive one upon the subject we are considering. It was a case from Maryland; and the opinion of the court was delivered by Chief Justice Taney, who was, of course, well versed in Maryland law. There a sale had been made under a judgment and execution against a party to whom the premises had been conveyed in trust for the benefit of his wife and children. The action was ejectment by the purchaser. It was held that the Statute of 5 Geo. II. which was in force in Maryland at the time of the cession, and which made "houses, land, negroes and other hereditaments and real estate" liable to execution "in like manner as personal estate," etc., "did not interfere with the established distinction between law and equity, and that an equitable interest could not be seized under a *fi. fa.* until the law of Maryland was in this respect altered by the Act of the Assembly of the State in 1810."

This Act expressly authorized the sale of equitable interests in real estate under execution. This enactment carried with it an implication, equivalent, under the circumstances, to an express declaration, that it could not be done before. Such, in the case last referred to, is stated to have been the law of Maryland up to that time. No such Act has been passed by Congress. The law in the Maryland part of the ceded territory has remained as it was at the time of the cession. Other authorities, to the same effect with those we have considered, might be cited from the adjudications of Maryland and other States; but it is unnecessary to pursue the subject further.

The judgments in nowise affected the trust premises until the bill was filed. That created a lien in favor of the judgment creditors. There was none before. This was posterior to the execution of both the deeds of trust in favor of the association, and to all the advances made under them.

The court below was clearly in error in sustaining the exception to the auditor's report, and in giving priority of payment to the judgments over the amount secured by the last deed of trust.

The decree is, therefore, reversed and the cause will be remanded, with directions to overrule the

exception to the auditor's report, and to enter a decree in conformity with this opinion.

CHESTER A. ARTHUR, COLLECTOR OF THE
PORT OF NEW YORK, *Plff. in Err.*,

v.

JAMES P. CUMMING ET AL.

(See S. C. 1 Otto, 362-365.)

Construction of revenue statutes—duties.

1. The rule in the construction of revenue statutes is, that the descriptive terms applied to articles of commerce shall be understood according to the acceptation given to them by commercial men in our own ports, at the time of the passage of the Act in which they are found.

2. The terms "oil-cloth foundations" and "floor-cloth canvas," as used in the Act of June 6, 1872, mean, in commerce, the same thing, and not burlaps, but a thing entirely distinct and different from that article.

3. Floor-cloth canvas, which is known in commerce as the article used for oil-cloth foundations, should pay a duty of forty per cent. *ad valorem*.

[No. 834.]

Argued Feb. 21, 23, 1876. Decided Mar. 20, 1876.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. Edwin B. Smith, Asst. Atty-Gen., for plaintiff in error.

Messrs. Geo. S. Sedgwick and Stephen G. Clarke, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

The defendants in error were the plaintiffs in the court below. They claim that they were the importers of certain burlaps, upon which the duty chargeable by law was thirty per cent. *ad valorem*; that the collector insisted the goods were "oil-cloth foundations," upon which the duty is forty per cent. *ad valorem*, and compelled them to pay accordingly. They paid under protest, and brought this suit to recover back the alleged excess of ten per cent. Under the instructions of the court, a verdict and judgment were given in their favor. The Collector thereupon sued out this writ of error.

The case arises under the 4th section of the Act of June 6, 1872, 17 Stat. at L., 282, and turns upon the construction to be given to that section with respect to the particulars here in controversy.

That section declares, that after the 1st of August, 1872, in lieu of the duties theretofore levied upon the articles mentioned in the section, there should be paid upon those articles imported from foreign countries the following duties, to wit:

"On all burlaps and like manufactures of flax, jute or hemp, or of which flax, jute or hemp shall be the component material of chief value, except such as may be suitable for bagging for cotton, thirty per centum *ad valorem*. On all oil-cloth foundations or floor-cloth canvas, made of flax, hemp or jute, or of which flax, hemp or jute shall be the component material of chief value, forty per centum *ad valorem*. On

all bags, cotton-bags and bagging, and all other like manufactures not herein provided for, except bagging for cotton, composed wholly or in part of flax, hemp, jute, gunny-cloth, gunny-bags or other material, forty per centum *ad valorem*."

All the testimony produced upon the trial is embodied in the bill of exceptions. It was introduced by the plaintiffs. The United States adduced none.

The rule to be followed in the construction of revenue statutes in case like this is well settled in this court. It is, that the descriptive terms applied to articles of commerce shall be understood according to the acceptation given by them to commercial men in our own ports at the time of the passage of the Act in which they are found. *U. S. v. Chests of Tea*, 9 Wheat., 430; *Elliott v. Swartwout*, 10 Pet., 151; *Curtis v. Martin*, 3 How., 106.

The statute here in question declares that "On all burlaps and like manufactures of flax, jute or hemp, * * * except such as may be suitable for bagging for cotton, a duty of thirty per centum *ad valorem* shall be paid."

The mercantile testimony in the record shows that the articles in question were "burlaps," that they were a "manufacture of jute," and that they were not suitable for bagging for cotton. The exception may, therefore, be laid out of view.

The language of the statute is clear and explicit. It is, "all burlaps" made of jute, etc. The mercantile proof brings the case exactly within this category. The fact that the burlaps were suitable, and could be and were used for oil-cloth foundations, or for any other purpose except bagging for cotton, is entirely immaterial. The maxim, *Repressio unius, exclusio alterius*, applies with cogent effect.

This view is conclusive, unless it is overcome by something else found in the statute.

The counsel for the United States insists that it is answered by the next category defined in the section; which is, that "on all oil-cloth foundations or floor-cloth canvas made of flax, jute or hemp," a duty shall be levied "of forty per cent. *ad valorem*."

Here, again, we must look to the mercantile testimony in the record. It is there stated that "floor-cloth canvas" is used exclusively for the manufacture of floor oil-cloth. "It has a harder twist, is heavier, is a more expensive article than burlaps, and is not calendered as burlaps are. * * * Floor-cloth canvas is a commercial term implying a well-known article of merchandise thus described; and a merchant, in speaking of foundations for oil-cloths, would be considered to refer to 'floor-cloth canvas.' Floor-cloth canvas is not called burlaps, nor is burlaps called floor-cloth canvas."

This testimony establishes two things: first, that the terms "oil-cloth foundations" and "floor-cloth canvas," as used in the statute, mean in commerce the same thing; and, second, that the thing so understood is not burlaps, but a thing entirely distinct and different from that article.

The second clause of the statute in nowise affects the first one. There is, therefore, no just ground for maintaining that the goods imported by the plaintiffs below were dutiable as oil-cloth foundations, not as burlaps.

The researches of the counsel for the defendants in error have brought to our attention See 1 Otto.

many instances in which two phrases with the like conjunction between them have been used to designate the same thing. In those cases it was obviously done to make clear and certain the meaning of the Legislature, and to leave no room for doubt upon the subject. Such in this section seems to have been the purpose of Congress. The phrase "oil-cloth foundations," would not necessarily import the article known in commerce as floor-cloth canvas; nor would the phrase "floor-cloth canvas" necessarily import an article to be used for "oil-cloth foundations."

Considering the juxtaposition and connection in which the two phrases are found, and letting in upon them the light of the mercantile evidence, the inference is clear that Congress used them and intended that they should be understood as convertible terms. This gives all the certainty and freedom from doubt which could be effected by the largest circumlocution.

It evinces, unmistakably, the purpose that the floor-cloth canvas, which is known in commerce as the article used for oil-cloth foundations, should pay a duty of forty per cent. *ad valorem*. The two designations have no effect beyond this result.

This examination of the statute and the record leaves no doubt in our minds upon the questions presented for our consideration.

As the case stood before the jury, the plaintiffs were clearly entitled to a verdict. The court, therefore, properly directed the jury to find accordingly. *Shuchardt v. Allens*, 1 Wall., 859 [68 U. S., XVII., 642].

It would have been error to refuse so to instruct them.

The judgment of the Circuit Court is affirmed.

DAVID F. BARNEY, *Appt.*.

v.

THE STEAMBOAT D. R. MARTIN, HER TACKLE, ETC., THE OYSTER BAY AND HUNTINGTON STEAMBOAT CO.

(See S. C., "The D. R. Martin," 1 Otto, 365-366.)

Jurisdiction as to amount.

On an appeal from the Circuit Court, the matter in dispute in this court is that which was in dispute in the Circuit Court, and if the amount in controversy in that court is only \$500, it is not sufficient to give this court jurisdiction.

[No. 576.]

Submitted Feb. 28, 1876. Decided Mar. 20, 1876.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The case is stated by the court.

Mr. Thomas Young, for appellees.

Mr. John M. Guiteau, for appellant:

When a suit in admiralty is appealed from a District Court to a Circuit Court, the proceedings in the appellate court are in the nature of a new trial. New evidence can be introduced, *non probata probare*. The cause is heard *de novo*,

NOTE.—Jurisdiction of U. S. Supreme Court depending on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases are reviewable without regard to sum in controversy. See note to *Gordon v. Ogden*, 28 U. S. (3 Pet.), 33.

as if no decree had been pronounced, and "The court does not enter into the mere consideration of the propriety of the decision of the court below upon the evidence before it, but affords an opportunity to the appellant to present his case with the best possible aspect that new allegations or new evidence can afford it."

Rose v. Himely, Bee, 318; *Yeaton v. U. S.*, 5 Cranch, 281.

The right of a respondent to introduce new evidence is nowhere restricted to cases where he has gone through the idle formality of following the appellant in the routine necessary to perfect an appeal.

It is submitted that in this case the Circuit Court had the power to make, in favor of the libellant, who was respondent there, a decree of such a nature and for such an amount as it thought proper in view of all the facts including those established by the new evidence introduced in his behalf and was not confined in the amount of its decree to \$500, the amount of the decree made by the District Court upon only part of the evidence before the Circuit Court.

See, *Stratton v. Jarvis*, 8 Pet., 4; *Shields v. Thomas*, 17 How., 8 (58 U. S., XV., 93).

Mr. Chief Justice Waite delivered the opinion of the court:

This suit was brought by Barney, the libellant, to recover damages for his wrongful eviction from the steamboat, D. R. Martin. He demanded in his libel \$25,000 damages, but in the District Court recovered only \$500. From this decree the claimant appealed. Barney did not appeal. The Circuit Court reversed the decree of the District Court, and dismissed the libel. From this decree of the Circuit Court, Barney appealed to this court.

The claimant now moves to dismiss the appeal, because the matter in dispute does not exceed \$2,000. This motion must be granted.

Barney, having failed to appeal from the decree of the District Court, is concluded by the amount found there in his favor. He appears upon the record as satisfied with what was done by that court. In the Circuit Court, the matter in controversy was his right to recover the sum which had been awarded him as damages. If that court had decided against the claimant, he could not have asked an increase of his damages. *Stratton v. Jarvis*, 8 Pet., 9, 10; *Houseman v. The N. Carolina*, 15 Pet., 40. The matter in dispute here is that which was in dispute in the Circuit Court, and as the matter in dispute here cannot exceed what was in dispute there, it follows that the amount in controversy between the parties in the present state of the proceedings is not sufficient to give us jurisdiction, *Gordon v. Ogden*, 3 Pet., 34; *Smith v. Honey*, 3 Pet., 469; *Walker v. U. S.*, 4 Wall., 164 [71 U. S., XVIII., 819].

The appeal is dismissed.

WILLIAM BARNES, Plff. in Err.,

v.

THE DISTRICT OF COLUMBIA.

(See S. C., 1 Otto, 540-556.)

Board of Public Works of District of Columbia
—municipal corporation, liable for negligence
and for defective condition of its streets.

1. A corporation can act only by its agents or servants.

2. The Board of Public Works of the District of Columbia is a part of and an agency of that municipal Corporation, whether its power comes to it by appointment of the President, or by the legislative Assembly, or by election; and the Corporation is liable for its acts or omissions.

3. A municipal corporation is liable for injury to an individual, arising from negligence in the construction of a work authorized by it, and for an injury arising from a defective condition of its streets, although the fee of the streets is not in the municipal corporation.

[No. 147.]

Argued Feb. 11, 14, 15, 1876. Decided Mar. 20, 1876.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. W. D. Davidge and R. K. Elliot, for plaintiff in error.

Mr. E. L. Stanton, for defendant in error.

Mr. Justice Hunt delivered the opinion of the court:

This is an action to recover damages for a personal injury received by the plaintiff on the 14th of October, 1871, in consequence of the defective condition of one of the streets of the City of Washington. The accident occurred on K Street east, and arose from the construction of the Baltimore and Potomac Railroad through that street. The road was built by permission of the Corporation, and authority was given to the company to change the grade of the streets according to a plan filed. In making this change, a deep pit or excavation was made, into which the plaintiff fell. The injury to the plaintiff, the defective condition of the street, and the negligence of those having it in charge are not before us. These questions were submitted to the jury, and the jury have found the issue upon each of them in favor of the plaintiff. The verdict of the jury, by which they awarded to him the sum of \$8,500 as damages, besides his costs, and the judgment thereon, were set aside at the general term of the District, and judgment was ordered in favor of the defendant. From this judgment the present writ of error was brought.

The municipal Corporation, "The District of Columbia," was organized under the Act of Congress of Feb. 21, 1871. 16 Stat. at L., 419.

The 1st section of the Act creates a municipal corporation by the name of "The District of Columbia," with power to sue, be sued, contract, have a seal, and "Exercise all other powers of a municipal Corporation, not inconsistent with the laws and Constitution of the United States and the provisions of this Act."

By section 2 the executive power is vested in a Governor, to be appointed by the President, with the consent of the Senate, and to hold his office for four years. Bills passed by the Council and House of Delegates, were to be presented to him for approval or rejection.

NOTE.—The common law liability to repair highways. See note to *City of Providence v. Clapp*, 5 U. S., XV., 73.

Liability to repair highways in U. S. Safety and convenience a mixed question of law and fact. See note to *Fitch v. Creighton*, 65 U. S., XVI., 308.

A secretary of the District is also provided for, whose duties are specified. The legislative power in the District is vested in two bodies—a Council, and House of Delegates—called a Legislative Assembly; which power it was in the 18th section declared should “extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this Act.”

It is enacted that the President, with the consent of the Senate, shall appoint a Board of Health, consisting of five persons, whose duties are pointed out. The salaries of the Governor and Secretary are prescribed, and are to be paid “at the Treasury of the United States.” The salaries of the members of the legislative Assembly are prescribed; but it is not declared where or how or by whom they shall be paid, unless they are included in the general terms of section 38.

By the 37th section it is provided that there shall be a “Board of Public Works, to consist of the Governor and four other persons to be appointed by the President, with the consent of the Senate, who shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues and alleys and sewers of the city, and all other works which may be intrusted to their charge by the legislative Assembly or Congress.” They are also required to disburse the money collected for such purposes, and to make an annual report of their proceedings to the legislative Assembly, and to furnish a duplicate of the same to the governor.

The charters of the Cities of Washington and Georgetown are declared to be repealed, except that they are continued in force for certain specified purposes not necessary to be here considered.

The statute creating this corporation, in its 1st section, declares it to be a body corporate, not only with power to contract, to sue and be sued, and to have a seal, but also that it is a body corporate for municipal purposes, and that it shall exercise all other powers of a municipal corporation, not inconsistent with the Constitution and laws of the United States and the provisions of this Act. 16 Stat. at L., 419.

A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The Legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again; it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the Legislature shall extend or contract the sphere of its action.

In his work on Municipal Corporations, sec. 835, *Judge Dillon* says: “As the highways of a State, including streets in cities, are under the paramount and primary control of the Legislature, and as all municipal powers are derived

from the Legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depends entirely upon their charter, or legislative enactments applicable to them. It is usual in this country for the Legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits, and the uses to which they may be appropriated. The authority to open, care for, regulate and improve streets, taken in connection with the other powers usually granted, give to municipal corporations all needed authority to keep the streets free from obstructions and to prevent improper uses, and to ordain ordinances to this end.”

A corporation can act only by its agents or servants. This obvious truth does not imply that the acts must be done by inferior or subordinate agents, but, on the contrary, the higher the authority of the agent, the more evident is the responsibility of the principal. While a State may be represented in various ways, no one will doubt that its Act, when declared through the means of its Legislature or its Governor within their respective spheres, is more emphatically obligatory upon it than when made known through its inferior departments.

A municipal corporation may act through its mayor, through its common council or its legislative department by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it in principle be of the slightest consequence by what means these several officers are placed in their position—whether they are elected by the people of the municipality or appointed by the President or a Governor. The people are the recognized source of all authority, state and municipal; and to this authority it must come at last, whether immediately or by a circuitous process.

An elected mayor or an appointed mayor derives his authority to act from the same source, to wit: that of the Legislature. The whole municipal authority emanates from the Legislature. Its legislative charter indicates its extent, and regulates the distribution of its powers as well as the manner of selecting and compensating its agents. The judges of the Supreme Court of a State may be appointed by the Governor with the consent of the Senate, or they may be elected by the people. But the powers and duties of the judges are not affected by the manner of their selection. The mayor of a city may be elected by the people, or he may be appointed by the Governor with the consent of the Senate; but the slightest reflection will show that the powers of this officer, his position as the chief agent and representative of the city, are the same under either mode of appointment. Whether his act in a case in question is the act of and binding on the city depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them, not at all upon the manner of his election. It is equally unimportant from what source he receives compensation, or whether he serves without it.

When the question is, whether an individual is acting for himself or for another, the inquiry

whether that other directed him to do the work and controlled its performance, and whether he promised to pay him for his service, may be important in determining that question. In a case like the one before us, where all the actors are in some form under the same authority, where all are created by the same Legislature, and it is a question of the distribution of conceded power, these suggestions are unimportant.

Nor are these by any means conclusive considerations in any case. A striking instance to the contrary is found in the case of *The China*, 7 Wall., 58 [74 U. S., XIX., 67]. It is there held, that although the master of the vessel is bound to take a pilot on board his vessel, and bound to take the first one offering his services, the owners are responsible for a collision caused by the negligence of the pilot thus in charge of the vessel.

In the case of the municipal Corporation before us, we have no doubt that the Governor and the Legislative Department are equally representatives and agents of that body, unaffected by the circumstance that the one is appointed by the President and the others are elected by the people; or that the one is paid from one source, and the others from another source. They are severally members and parts of a municipal corporation, whose charter emanates from the Congress of the United States, and by which their powers and authority are conferred or defined.

Whether the Board of Public Works is also a part of and an agency of the municipal Corporation is the question before us.

1. The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys and highways, the regulation of grades, and the opening of new and closing of old streets, is peculiarly municipal duty. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done. Accordingly, although complaints are often made of corruption and venality, as they are, indeed, of all public functionaries, and attempts made to substitute other agencies, the general judgment of the country has always accepted the municipal organization as the one subject to the least objection for the execution of this duty. In inquiring, therefore, where this power was vested in a particular case, we should expect to find that it was given to the municipality.

2. The Act of Congress of February 21, 1871, is entitled "An Act to Provide a Government for the District of Columbia," and its intention is to accomplish that end by the means of a municipal corporation called "The District of Columbia." The powers given to it are to contract, sue and be sued, to have a seal, and all other powers of a municipal corporation, not inconsistent with the Constitution and laws of the United States or the provisions of this Act. The powers thus given are to be exercised by the means and agencies in the Act specified; and, unless these means and agencies do represent the Corporation, it has nothing and does nothing. It is a nonentity. The first of these is the existence of a Governor, who is invested with the executive power in and over the District of Columbia. This office is a large type of a mayoralty; and his acts or declarations, or

notices or services upon him, within the sphere of executive authority, are those of or upon the municipal Corporation.

The legislative Assembly also is a large edition of a common council, and is the especial power and organ of the municipality in regulating its ordinary business and affairs.

The 37th section defines and locates the power to regulate and repair the streets and highways in the District of Columbia. The persons there referred to are invested with the entire control of the streets, their regulation and repair. It is declared that there shall be "a Board of Public Works," of whom the chief agent of the city corporation—viz.: the Governor—shall be one, and four other persons to be nominated by the President; and to this board is given the powers specified. The full text of the section is as follows:

BOARD OF PUBLIC WORKS.

"SEC. 37. *And be it further enacted*, That there shall be in the District of Columbia a Board of Public Works, to consist of the Governor, who shall be president of said Board; four persons, to be appointed by the President of the United States, by and with the advice and consent of the Senate, one of whom shall be a civil engineer, and the others citizens and residents of the District, having the qualifications of an elector therein. (One of said Board shall be a citizen and resident of Georgetown, and one of said board shall be a citizen and resident of the county outside of the cities of Washington and Georgetown. They shall hold office for the term of four years, unless sooner removed by the President of the United States. The Board of Public Works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys and sewers of the city, and all other works which may be intrusted to their charge by the legislative Assembly or Congress.

They shall disburse upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected from property holders in pursuance of law, for the improvement of streets, avenues, alleys and sewers, and roads and bridges; and shall assess, in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvements authorized by law and made by them, a reasonable proportion of the cost of the improvement, not exceeding one third of such cost, which sum shall be collected as all other taxes are collected.

They shall make all necessary regulations respecting the construction of private buildings in the District of Columbia, subject to the supervision of the legislative Assembly.

All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District; and said Board of Public Works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made. All contracts made by said Board, in which any member of said Board shall be personally interested, shall be void; and no payment shall be made thereon by said District, or any officers thereof.

On or before the first Monday in November of each year, they shall submit to each branch of the legislative Assembly a report of their transactions during the preceding year, and also furnish duplicates of the same to the Governor, to be by him laid before the President of the United States for transmission to the two Houses of Congress; and shall be paid the sum of \$2,500 each, annually."

1. The four persons composing this Board are nominated by the President, and hold their offices for a fixed period of time. They cannot be removed except by the President of the United States. The same thing is true of the Governor and of the Secretary of the District; except that, as to them, there is no power of removal. Each is appointed in the same manner, and holds until the expiration of his term and until his successor is qualified. The same is true, also, of the members of the council, except that their term is of shorter duration. It is true, also, in relation to the house of delegates, except that they are elected by the people, and hold their offices for a fixed term of one year. We have already endeavored to show that it is quite immaterial, on the question whether this Board is a municipal agency, from what source the power comes to these officers—whether by appointment of the President, or by the legislative Assembly, or by election.

2. This Board is invested with the entire control and regulation of the repair of streets and alleys, and all other works which may be intrusted to their charge by the legislative Assembly or Congress. They shall disburse all the money appropriated by the legislative Assembly or by Congress, or collected from property holders for the improvement of streets and alleys.

It is to be noticed here, that the municipal Corporation, as represented by the legislative assembly, may impose upon this Board such other duties as they think proper. The Board is to perform "all other work intrusted to their charge by the legislative Assembly or Congress." In this respect, certainly, it is not an independent body. It is subject to two masters, either of whom may impose upon it any other work it may choose, and which work it is bound to perform. Its dependence upon Congress and upon the legislative Assembly in this respect rests upon the same basis. It will not be claimed by any one that it is not subject to the control of Congress, and dependent upon that body.

3. The Board shall disburse all moneys appropriated by the United States or the District of Columbia, or collected from property holders, for improvements of streets or alleys. In doing the two acts here first specified, the Board again acts as the hand and agent of the United States or of the District, as the case may be.

4. On or before the first Monday of each year, the Board is required to make a report of their transactions during the preceding year to each branch of the legislative Assembly, and also to the President; to be placed before Congress by him. This duty is also an indication of their subordination equally to Congress and to the legislative Assembly. The powers given to this board are not of a character belonging to independent officers, but rather those which indicate that it is the representative of the municipal Corporation.

See 1 Otto.

Notwithstanding these features, and notwithstanding we find this power given by the Act which creates the municipality, and that this is one of the powers ordinarily belonging to municipal government, and although the manner of its bestowal and the selection of the agents who exercise it are similar to that of the other appointees and agents of the municipal Corporation, it is still contended that no liability exists on the part of the Corporation to compensate the plaintiff for his injuries.

It is denied that a municipal corporation, as distinguished from a corporation organized for private gain, is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such a work is a judicial act; and, if injury arises from the mere execution of that plan, no liability exists. *Child v. Boston*, 4 Allen, 41; *Thayer v. Boston*, 19 Pick., 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation cannot be charged. *Detroit v. Blackeby*, 21 Mich., 84; is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair.

The authorities establishing the contrary doctrine that a city is responsible for its mere negligence, are so numerous and so well considered, that the law must be deemed to be settled in accordance with them. English authorities: *Mayor v. Henley*, 2 Cl. & F., 381; *Mersey Docks v. Gibbs*, L. R. 1 Eng. & Ir. App., 93; *Mersey Docks v. Penhallow*, L. R. 1 H. L. Cas. (N. S.), 93; *Gibbs v. Liverpool Docks*, 1 Hurl. & N., 439; *Canal Co. v. Parnaby*, 11 Ad. & Ell., 223; *Scott v. Mayor*, 37 Eng. L. & E., 495.

United States authorities: *Weightman v. Washington*, 1 Black, 89 [66 U. S., XVII., 52]; *Nebraska v. Campbell*, 2 Black, 590 [67 U. S., XVII., 271]; *Robbins v. Chicago*, 4 Wall., 658 [71 U. S., XVIII., 427]; *Supervisors v. U. S.*, 4 Wall., 485 [71 U. S., XVIII., 419]; *Mayor v. Sheffield*, 4 Wall., 194 [71 U. S., XVIII., 418].

New York: *Davenport v. Ruckman*, 37 N. Y., 568; *Requa v. Rochester*, 45 N. Y., 129; *Rochester W. L. Co. v. Rochester*, 8 N. Y., 463; *Conrad v. Ithaca*, 16 N. Y., 158; *Barton v. Syracuse*, 36 N. Y., 54.

Illinois: *Browning v. Springfield*, 17 Ill., 143; *Clayburgh v. Chicago*, 25 Ill., 535; *Springfield v. Le Claire*, 49 Ill., 476.

Alabama: *Smoot v. Mayor of Wetumpka* 24 Ala. (N. S.), 112.

Connecticut: *Jones v. New Haven*, 34 Conn., 1.

North Carolina: *Meares v. Wilmington*, 9 Ired., 73.

Maryland: *Anne Arundel Co. v. Duckett*, 20 Md., 468.

Pennsylvania: *Pittsburg v. Grier*, 22 Pa., 54; *Erie v. Schwingle*, 22 Pa., 388.

Wisconsin: *Cook v. Milwaukee*, 24 Wis., 270; *Ward v. Jefferson*, 24 Wis., 342.

Virginia: *Sawyer v. Coras*, 17 Gratt., 241; *Richmond v. Long*, 17 Gratt., 375.

Ohio: *Western Coll. v. Cleveland*, 12 Ohio St. (N. S.), 877; *McCombs v. Akron*, 15 Ohio, 476; *Rhodes v. Cleveland*, 10 Ohio, 159.

And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city char-

ter, and the involuntary *quasi* corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. 1 Dillon, secs. 10, 11, 18; 2 Dillon, sec. 761.

The latter are auxiliaries of the State merely and, when corporations, are of the very lowest grade, and invested with the smallest amount of power. Accordingly, in *Conrad v. Ithaca*, 16 N. Y., 158, the village was held to be liable for the negligence of their trustees, while in *Weet v. Brockport* the town was said not to be liable for the same acts by their commissioners of highways. 16 N. Y., 161, 3, 4, 9. See Brooke, Abr., "Action on the case;" *Russell v. Men of Devon*, 2 T. R., 667, and cases there cited; *Conrad v. Ithaca*, *supra*.

Whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed. Decisions or analogies derived from this source are of little value in fixing the liability of a city or a village. See Dillon, *supra*.

Again; it is contended that the Board of Public Works of the District of Columbia is an independent body, acting for itself, not forming a part of the Corporation, and that the Corporation is not responsible for its acts. We have analyzed the power of this body in a previous part of this opinion, and have set out in full the language of the 37th section.

Upon this point, also, we are able to derive assistance from the adjudged cases.

The case of *Bailey v. Mayor*, in the Supreme Court of New York, 3 Hill, 531, and again in the Court of Errors, 2 Den., 433, is a leading authority upon this question. In the year 1834, the Legislature of the State of New York passed an Act "To Provide for Supplying the City of New York with Pure and Wholesome Water." Sess. L., 1834, p. 531. The Act provided that the Governor should appoint five persons, to be known as water commissioners, whose duty it was made to examine all matters relative to that subject, sec. 2; to employ such engineers as they should deem necessary, sec. 3; to adopt such plan as they should deem most advantageous for procuring such supply of water; to ascertain the amount of money needed for the purpose; and to make conditional contracts for the purchase of lands required, subject to the ratification of the Common Council of New York, sec. 4. The plan, the estimate of the expense, the conditional contracts, and all other matters connected therewith, were to be presented by the commissioners to the Common Council of New York, secs. 5, 6, who were directed to submit the plan to the electors of New York for their rejection or approval, sec. 7. If approved, the council were to direct the commissioners to proceed with the work; and the council was authorized to raise by loan \$2,500,000, which money was to be applied to the purposes of the Act "by or under the direction of the commissioners," sec. 11. The commissioners were authorized to enter upon lands, agree for their purchase or take measures for their condemnation, secs. 12-14, and to use the ground or soil under any street or highway within the State for the purpose of introducing the water, sec. 15. The commissioners were

authorized to draw on the city comptroller for all sums due for the purchase of lands, and sums due to contractors, and for their own incidental expenses; and the payments were required to be reported to the council once in every six months.

Under this statute a plan was prepared and approved by the citizens of New York, money was raised and the work was entered upon. It was proved that the commissioners entered into a contract with Crandall & Van Zandt for building a dam across the Croton River, which was about forty miles from the City of New York, and in another county, in pursuance of the plan adopted. The plaintiff offered also to prove that it was so negligently and carelessly constructed, that upon the occurrence of a freshet in 1841 it was swept away and the property of the plaintiff, real and personal, situate on both sides of the river below the dam, was destroyed to the value of \$60,000. The circuit judge rejected the evidence and directed the plaintiff to be nonsuited. The case was carried to the Supreme Court, where the nonsuit was set aside. The judgment was delivered by Nelson, Ch. J., whose opinion opens in these words: "The principal ground taken at the circuit against this action, and the one upon which it was understood the cause there turned, was that the defendants were not chargeable for negligence or unskillfulness in the construction of the dam in question, inasmuch as the water commissioners were not appointed by them, nor subject to their direction or control." The learned judge repudiates the argument arising from the fact that the commissioners were appointed by the State; that the defendants had no control over their actions; that they were bound to employ them, and submit to the independent exercise of their control. He held that the commissioners were the agents of the city, and that the latter was responsible for their negligent conduct.

The case was then carried to the Court of Errors of the State of New York, 2 Den., 433, where the judgment of the Supreme Court was affirmed. Chancellor Walworth bases his opinion of affirmance chiefly upon the fact that the city was the owner of the land on which the dam was built, and therefore liable for the negligent conduct of those who built it. Senators Hand, Bockee and Barlow base their judgments of affirmance on the ground that the commissioners were the agents of the city. Gardner, Lieutenant-Governor, delivered an able dissenting opinion.

This case is nearer to the one we are considering than any other reported in the books. The struggle in the New York courts was between the dictates of that evident justice and good sense, which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it.

If these courts had had before them the additional facts which exist in this case, to wit: that, in the very statute which made the City of New York a municipal corporation, these persons had been appointed to do everything necessary to be done respecting the care and improvement of the streets, being invested

with their exclusive control; that without that body, and two other equally independent bodies (to wit: the mayor and the legislative Assembly, neither of them being declared in words to be part of the municipal body), the municipal corporation had no one part of an organized existence—we think they would have arrived at the same conclusion, but would have found less difficulty in choosing a ground on which to place their judgment.

In the case before us, we think that Congress intended to make the Board of Public Works a portion of the municipal Corporation. The Governor, or mayor, as he would ordinarily be called, represented the Executive Department; the legislative Assembly, like a common council, had the exclusive authority to pass all laws or ordinances upon the large class of subjects committed to its charge, with certain specified restrictions; and to the Board of Public Works, like an ordinary agent of the Corporation, was given the exclusive control of the streets and alleys. Names are not things. Perhaps there is no restriction on the power of Congress to create a State within the limits of the District of Columbia; but it does not make an organization a State to call its mayor a Governor, or its common council a legislative Assembly, or its superintendent of streets a Board of Public Works, especially when the statute by which they are created opens with a declaration of its intention to create a municipal corporation. We take the body thus organized to be a municipal corporation, and that its parts are composed of the members referred to; and we hold, therefore, that the proceedings by that body, in the repair and improvement of the street out of which the accident in question arose, are the proceedings of the municipal Corporation. That in such case the Corporation is responsible, we have already cited the authorities to show.

No doubt there are authorities holding views not in all respects in harmony with those we have expressed. Among these are *Thayer v. Boston*, 19 Pick., 510; *Walcott v. Swampscott*, 1 Allen, 101; *Child v. Boston*, 4 Allen, 41. The first of these cases holds that a city corporation is liable in tort, provided the act is done by the authority and order of the city government, or those branches of the government invested with authority to act for the corporation; but that it must appear that the act was done by the express authority of the city, or *bona fide* in pursuance of a general authority on the subject. To this we assent. *Walcott v. Swampscott* was an action against a town. The surveyor of highways employed one O'Grady to drive a horse and cart with a load of gravel for the repair of a highway; and, while thus engaged, he came in collision with the plaintiff. The town was held not to be liable, on the theory that the surveyor was not an agent or servant of the town, but an independent officer appointed to perform a public duty in which the town had no interest. In *Child v. Boston* it was held that the city was not responsible for any deficiency in the plan of drainage adopted by the city, although the plaintiff was injured thereby; that the duty in this respect was of a quasi-judicial nature, involving discretion and depending upon public considerations; that in this they acted, not as agents of the city, but as public officers. In this respect the case is in hostility to

See 1 Otto.

Rock. W. Lead Co. v. Rochester, 8 N. Y., 463, where the city was held liable because it constructed a sewer which was not of sufficient capacity to carry off the water draining into it. The work was well done; but the adoption and carrying out of the plan was held to be an act of negligence. The Boston case, however, holds, that if a sewer, originally well constructed, becomes defective by reason of low lands being filled up so that the outflow is obstructed, it is the duty of the city so to extend the sewer that its efficiency shall be restored, and that for a failure to do so it becomes liable to those whose property is injured by the overflow of the sewer. In its practical results, this is one of the strongest cases to be found in favor of municipal liability.

We do not perceive that the circumstance that the fee of the streets is in the United States, and not in the municipal corporation, is material to the case. In most of the cities of this country, the fee of the land belongs to the adjacent owner; and, upon the discontinuance of the street, the possession would revert to him. The streets and avenues in Washington have been laid out and opened by competent authority. The power and the duty to repair them is undoubted, and would not be different were the streets the absolute property of the Corporation. The only questions can be as to the particular person or body by which the power shall be exercised, and how far the liability of the city extends.

The judgment of the General Term is reversed and the case is remanded to the Supreme Court of the District of Columbia, with directions to affirm the judgment of the Special Term upon the verdict.

Mr. Justice Field, dissenting:

I dissent from the judgment in this case. I do not think the District of Columbia should be held responsible for the neglect and omissions of officers whom it has no power to select or control.

Mr. Justice Bradley concurs in this dissent.

Also dissenting, *Mr. Justice Swayne* and *Mr. Justice Strong*.

Cited—8 Hughes, 193, 209; 2 McA., 493; 3 McA., 595; 96 N. Y., 271, 274, 437; 31 Gratt., 281; 31 Am. Rep., 281; 122 Mass., 372; 23 Am. Rep., 359, 364; 20 S.C., 120; 47 Am. Rep., 830, 831; 46 Texas, 533; 26 Am. Rep., 285.

CHARLES D. MAXWELL, *Plff. in Err.*,

v.

THE DISTRICT OF COLUMBIA.

(See S. C., 1 Otto, 557.)

District of Columbia liable for injuries from unsafe streets.

1. The District of Columbia is liable for damages for injuries sustained in consequence of the unsafe condition and negligent management of its streets.

2. This case is controlled by that of *Barnes v. District of Columbia*, ante, 440.

[No. 187.]

Argued Feb. 2, 3, 1876. Decided Mar. 20, 1876.

IN ERROR to the Supreme Court of the District of Columbia.

The case is sufficiently stated in the opinion and in the case there referred to.

Messrs. F. P. B. Sands and James Hoban, for plaintiffs in error.

Mr. E. L. Stanton, for defendant in error.

Mr. Justice Hunt delivered the opinion of the court:

This is an action to recover damages for injuries sustained by the plaintiff on the first day of March, 1872, in consequence of the unsafe condition and negligent management of the streets of the District of Columbia. The court below ruled that the District was not liable, and directed a verdict for the defendant.

The case is controlled by that of *Barnes v. The District*, in which the opinion has just been delivered [*ante*, 440].

The judgment is reversed and a new trial ordered.

Dissenting, same as in No. 147.

FRANCIS X. DANT, *Plff. in Err.*,

v.

THE DISTRICT OF COLUMBIA.

(See S. C., 1 Otto, 557, 558.)

District of Columbia, liable for defective streets.

1. The District of Columbia is liable for damages sustained in consequence of the unsafe condition and negligent management of its streets.

2. This case is controlled by the principles governing that of *Barnes v. District of Columbia*, *ante*, 440. [No. 138.]

Submitted Feb. 3, 1876. Decided Mar. 20, 1876.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated in the opinion of the court and in the case there referred to.

Mr. R. Fendall, for plaintiffs in error.

Mr. E. L. Stanton, for defendant in error.

Mr. Justice Hunt delivered the opinion of the court:

This is an action to recover damages sustained by the plaintiff on the 14th of November, 1871, in consequence of the unsafe condition and negligent management of the streets of the District of Columbia. The court below ruled that the District was not liable, and directed a verdict for the defendant.

The case is controlled by the principles governing that of *Barnes v. The District*, in which the opinion has just been delivered [*ante*, 440].

The judgment is reversed and a new trial ordered.

Dissenting, same as in No. 147.

Cited—106 U. S., 8.

JOHN HALL, J. J. THORNTON, JAMES B. HUBBELL, LUCIUS DYER, WILLIAM REID ET AL., *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C., 1 Otto, 559-565.)

Collector, allowance to—secretary's decision.

1. No allowance can be made by the accounting officers of the Treasury in settling the accounts of a Collector of Internal Revenue, unless the same had been previously approved by the Secretary of

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the Treasury, under the 25th section of the Act prescribing such compensation.

2. No appeal lies from his decision in that regard, either to the accounting officers of the Treasury or to the courts. His decision is final, unless reversed by Congress.

[No. 155.]

Argued Feb. 18, 1876. Decided Mar. 20, 1876.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

Messrs. H. J. Horn and Gilfillan & Williams, for plaintiffs in error, cited *U. S. v. Macdaniel*, 7 Pet., 1, and two succeeding cases: *U. S. v. Wilkins*, 6 Wheat., 185; *Gratiot v. U. S.*, 15 Pet., 336; *U. S. v. Robeson*, 9 Pet., 319.

Mr. E. B. Smith, Asst. Atty-Gen., for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Fifteen hundred dollars per annum are allowed to collectors of internal revenue as salary for their services and that of their deputies, to be paid quarterly. Commissions, in addition to salary, are also allowed to such officers, to be computed upon the amounts by them respectively collected, paid over and accounted for, under the instructions of the Treasury Department, as follows: three per cent. upon the first \$100,000; one per centum upon all sums above \$100,000, and not exceeding \$400,000; and one half of one per centum on all sums above \$400,000. Such an officer may also keep and render to the proper officers of the Treasury an account of his necessary and reasonable charges for stationery and blank books used in the performance of his official duties, and for postage actually paid on letters and documents received or sent, and exclusively relating to official business; and, if the account is approved by the proper accounting officers, the collector is entitled to be paid for the same; but the provision is that no such account shall be approved, unless it shall state the date and the particular items of every such expenditure, and shall be verified by the oath or affirmation of the collector.

Two provisos are annexed to those enactments: (1) That the salary and commissions of no collector, exclusive of stationery, blank books and postage, shall exceed \$10,000 in the aggregate, nor more than \$5,000, exclusive of the expenses for rent, stationery, blank books and postage, and pay of deputies and clerks, to which such collector is actually and necessarily subjected in the administration of his office. (2) That the Secretary of the Treasury be authorized to make such further allowances from time to time, as may be reasonable, in cases in which, from the territorial extent of the district or from the amount of internal duties collected, or from other circumstances, it may seem just to make such allowances. 18 Stat. at L., 231.

Sufficient appears to show that the principal defendant was duly appointed a collector of internal revenue under the Act of Congress in that case made and provided, and that the foundation of the suit is the official bond given by the appointee for the faithful discharge of the duties of the office. Breaches of the conditions of the bond having been committed, as alleged, the United States commenced an action of debt in the district court against the principal and his sureties, claiming the penalty of

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the bond. Service was made; and the defendants appeared, and pleaded (1) *non est factum*; (2) performance; (3) set-off in the sum of \$8,203.06 for money before that time advanced, paid, laid out and expended by the defendant to and for the use of the plaintiffs, and at their instance, for the work and labor of the defendant and his servants and deputies, done and performed by him, as such collector, for the plaintiffs, and at their instance and request.

Claim is also made for the same sum in the same plea, upon the ground that it was due and owing to the defendant from the plaintiffs for commissions, expenses and charges for extra services of himself and his servants, done and performed at the special instance and request of the plaintiffs.

Issue was joined by the plaintiffs upon the first plea; and to the second the plaintiffs reply, and deny that the defendant has well and truly performed the conditions of the writing obligatory, and assign the following breaches: (1) That he has not accounted for and paid over to the United States all the public moneys which came into his hands, in compliance with the orders and regulations of the Secretary of the Treasury. (2) That he did not faithfully execute and perform all the duties of his office, as more fully set forth in the replication.

Both parties, having waived a trial by jury, went to trial before the court without a jury; and the finding and judgment were for the plaintiffs, in the sum of \$11,517.63. Exceptions were filed by the defendants; and they sued out a writ of error, and removed the case into the circuit court.

Due settlement of the collector's accounts had been made by the accounting officers of the Treasury; and the plaintiffs, to support the issues on their part, introduced the certified transcript of the same, to which the defendants objected; but the court overruled the objection, and admitted the evidence; and the defendants excepted. Said transcript included the statement of differences, and showed that the sum of \$20,120 was the balance due from the collector.

Collections, it seems, had been made by the officer, for the preceding year, amounting to \$77,702.08; and it did not appear that he had been paid during that period any extra allowance above his salary and commissions, nor that any of the charges claimed as set-off had been credited in the settlement of his accounts. Apart from that, it was admitted by the plaintiffs that the defendants had paid into court the sum of \$11,435.17, which is to be deducted from the balance found due from the defendants by the accounting officers of the Treasury.

Set-offs were claimed by the defendants, as follows: (1) \$5,010 paid by the collector, during the summer and fall of 1866, to sixteen deputy collectors employed by him during that period in his district. (2) \$648 paid for the hire of clerks in his office during the quarter ending Sep. 30 of the same year. (3) \$1,100 paid for hire of clerks in making out his accounts and returns during that and the succeeding year.

Nothing being alleged to the contrary, it will be assumed that those several claims had been duly presented to the proper officers of the Treasury, and that they had been finally disallowed. They were separately offered in evidence at the

trial; and the ruling of the court in each instance was, that the same was properly rejected by the accounting officers of the Treasury. Seasonable exception to the ruling of the court was taken by the defendants. Appearance was entered by each party in the circuit court, and they were both there heard; and the circuit court affirmed the judgment of the district court, and the defendants sued out the present writ of error.

Errors have not been assigned, as required by the rules of the court; but the course of the argument, as exhibited in the printed brief, warrants the conclusion that the only errors relied on are the rulings of the district court, that the accounts filed in set-off were properly rejected by the accounting officers of the Treasury. Defendant litigants had no right to file accounts in set-off at common law; nor did they ever have that right until the passage of the Statute of 2 Geo. II., ch. 24, sec. 4, which enacted, in substance and effect, that, where there were mutual debts between the plaintiff and the defendant, one debt may be set against the other, and that such matter may be given in evidence under the general issue, or may be pleaded in bar, so that notice shall be given of the sum or debt intended to be offered in evidence. Chit. Cont., 948.

Questions of the kind, where the United States are plaintiffs, must be determined wholly by the Acts of Congress, as the local laws have no application in such cases. *U. S. v. Eckford*, 6 Wall., 490 [73 U. S., XVIII., 922]; *U. S. v. Robeson*, 9 Pet., 324; Conk. Treat., 127.

Judgment in such suits is required to be rendered at the return Term, unless the defendant shall, in open court, make oath or affirmation that he is equitably entitled to credits which had not been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the Treasury and rejected, and specifying each particular claim so rejected in the affidavit. 1 Stat. at L., 515; *U. S. v. Giles*, 9 Cranch, 236; 5 Stat. at L., 83.

Section 4 of the same Act provides that, in suits between the United States and individuals, no claim for a credit shall be admitted at the trial except such as shall appear to have been submitted to the accounting officers of the Treasury for their examination, and to have been by them disallowed, unless it shall appear that the defendant, at the time of the trial, is in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States, or some unavoidable accident.

Claims for credit in suits against persons indebted to the United States, if it appears that the claim had previously been presented to the accounting officers of the Treasury for their examination, and had been by them disallowed in whole or in part, may be admitted upon the trial of the suit; but it can only be admitted as a claim for credit, and must be proved to be just and legal before it can be allowed. Equitable claims for credit, if falling within the latter clause of the 4th section of that Act, may be admitted at the trial of such a suit, though never presented to and disallowed at the Treasury; but the presentation of such a claim will amount to nothing, unless it is proved that the same is justly due to the claimant.

Due returns, it seems, were made by the collector. It is not questioned that his accounts were regularly settled by the accounting officers of the Treasury; nor is it suggested that due credit was not given to him for everything which he could properly claim, except for the extra services and expenses charged in the accounts filed in set-off; and it appears that those accounts were duly presented to the accounting officers of the Treasury, and were by them rejected before the suit was instituted. When the claims were offered, the court admitted the evidence; and the only complaint is, that the court ruled that the claims were properly rejected by the accounting officers of the Treasury, which is the only question presented for decision.

Independent of the second proviso to the section defining the compensation to be allowed to such collectors, it would be clear, beyond every doubt, that no claim of the kind could be allowed by any court, as appears from the Acts of Congress upon the subject and the decisions of this court. Legislation upon the subject commenced with respect to Collectors of the Customs, but was ultimately extended to all executive officers with fixed salaries, or whose compensation was prescribed by law. Section 18 of the Act of the 7th of May, 1822, provided that no collector, surveyor or naval officer shall ever receive more than \$400 annually, exclusive of his compensation as such officer, and the fines and forfeitures allowed by law for any service he may render in any other office or capacity. 3 Stat. at L., 696.

Prior to that, the settled practice and usage were to require collectors to superintend lights and light-houses in their districts, and to disburse money for the revenue-cutter service. Services of the kind were charged as extra services, and extra compensation was in many cases allowed for such service, until Congress interfered, and by that Act gave such officers a fixed compensation, subject to the provision that they should never receive more than \$400, exclusive of the fixed compensation, and their due proportion of fines, penalties and forfeitures. Officers not named in that Act also received fixed salaries; and they, whenever they performed extra service under the directions of the head of a department, claimed extra compensation. Claims of the kind were in some instances disallowed; and in certain cases, where litigation ensued, it was decided by this court that such claims were a proper set-off to the money demands of the United States. *Minis v. U. S.*, 15 Pet., 423; *Gratiot v. U. S.*, 15 Pet., 386; *U. S. v. Ripley*, 7 Pet., 18.

Litigations of the kind became frequent; and Congress again interfered, and provided that no officer in any branch of the public service, or any other person whose salary or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money or the performance of any other service, unless the said extra allowance or compensation be authorized by law. 5 Stat. at L., 849.

Since then many other Acts of Congress have been passed upon the subject, of which one more only will be reproduced. Like the preceding Act, it provides that no officer in any

branch of the public service, or any other person whose salary, pay or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same shall be authorized by law; and the appropriation, therefore, is explicitly set forth that it is for such additional pay, extra allowance or compensation. 5 Stat. at L., 510; 9 Stat. at L., 297, 365, 367, 504, 542, 543, 629; 10 Stat. at L., 97-100, 119, 120.

Compensation for extra services, where no certain sum is fixed by law, cannot be allowed by the head of a department to any officer who has by law a fixed or certain compensation for his services in the office he holds, unless such head of a department is thereto authorized by an Act of Congress; nor can any compensation for extra services be allowed by the court or jury as a set-off, in a suit brought by the United States against any officer for public money in his hands, unless it appears that the head of the department was authorized by an Act of Congress to appoint an agent to perform the extra service, that the compensation to be paid for the service was fixed by law, that the service to be performed had respect to matters wholly outside of the duties appertaining to the office held by the agent, and that the money to pay for the extra services had been appropriated by Congress. *Conner v. U. S.*, 21 How., 470 [62 U. S., XVI., 194].

None of the conditions precedent suggested existed in the case before the court; and it follows that no such allowance could have been made by the accounting officers of the Treasury in settling the accounts of the principal defendant, unless the same had been previously approved by the Secretary of the Treasury, under the second proviso in the 25th section of the Act prescribing the compensation to be allowed to the collectors of internal revenue. 13 Stat. at L., 232.

Authority is there given to the Secretary of the Treasury to make such further allowances to such collectors, from time to time, as may be reasonable, but the power to be exercised in that behalf is one vested in his discretion, both as to time and amount. He may make an allowance one year, and refuse it the next, or he may never make it at all, as to him may seem just and reasonable. No appeal lies from his decision in that regard, either to the accounting officers of the Treasury or to the courts. Instead of that his decision is final, unless reversed by Congress.

Judgment affirmed.

JAMES N. HALL ET AL. v. UNITED STATES.
[No. 156. S. C., 1 Otto, 566].

Error to the Circuit Court of the United States for the District of Minnesota.

[Same counsel as in next preceding case, with which it was argued and submitted].

Mr. Justice Clifford delivered the opinion of the court:

Suffice it to say, that the suit in this case is in all material respects exactly similar to the case just decided, and the pleadings filed by the defendants are precisely similar. It was com-

menced in the District Court; and the parties waived a jury, and the finding and judgment were for the plaintiffs. Exceptions were filed by the defendants, and they removed the cause into the Circuit Court. All the questions in the Circuit Court were the same as in the preceding case; and the Circuit Court, having heard the parties, affirmed the judgment of the District Court. Whereupon the defendants sued out the present writ of error. Due examination has since been given to the case, and we find no error in the record. Our reasons for the conclusion are given in the other case.

Judgment affirmed.

MARY R. KOHL AND JOHN W. KOHL,
Executors of JOHN S. KOHL, Deceased, ET
AL., *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C., 1 Otto, 367-379.)

Eminent domain, right of in Federal Government—custom-house—circuit court—separate trial.

1. The right of eminent domain exists in the Federal Government, and may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.

2. Under the Acts of Mar. 2, 1872, and of June 10, 1872, the United States could acquire lands in Cincinnati for a custom-house, by the right of eminent domain.

3. The Circuit Court had jurisdiction of the proceeding under the general grant of jurisdiction made by the Act of 1789.

4. The court is not required to allow a separate trial to each owner of an estate or interest in each parcel.

[No. 144.]

Argued Feb. 11, 1876. Decided Mar. 27, 1876.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was a proceeding instituted in the Circuit Court of the United States for the Southern District of Ohio, by the District Attorney of the United States, to appropriate a lot of land in the City of Cincinnati for a site for a post-office and other public buildings.

The plaintiffs in error owned a perpetual leasehold estate in a portion of the property sought to be appropriated. They moved to dismiss the proceeding on the ground of want of jurisdiction, which motion was overruled. They demanded a separate trial of the value of their estate in the property, which was refused and they were required to try the question of the value of their property jointly with William S. Groesbeck, who was the lessor of the property to the plaintiffs in error, and whose estate in the property was also sought to be taken. Upon the verdict the Circuit Court proceeded to render a judgment, and adjudged that a writ of possession issue, requiring the Marshal to re-

move the plaintiffs in error from the premises, and to place the United States, by its proper agents, in possession thereof.

Messrs. Stallo & Kittridge, Fred. Chase and Stanley Matthews, for plaintiffs in error:

The Circuit Court affirmed its jurisdiction upon the ground that the proceeding asserted title to take the property under a power of eminent domain in the National Government. It is a fact of some significance in considering whether Congress has provided for the exercise of such a power by the laws to which reference is made in this case, that it is historically true that, for upwards of eighty years after the foundation of the Government, no Act of Congress was ever passed for the exercise of this power.

There are three Acts of Congress which have reference to the acquisition of a site for a post-office in Cincinnati. The first, approved Mar. 2, 1872, 17 Stat. at L., 39; in the appropriation Act of June 10, 1872, 17 Stat. at L., 852, a further provision was made, and in the subsequent Appropriation Act of Mar. 3, 1873, 17 Stat. at L., 528, a further provision was inserted.

It was said that these Acts did invoke the exercise of this power, and that under them a cause of a civil nature at common law was provided for, whereof the Circuit Court under the 11th section of the Judiciary Act of 1789 would have a concurrent jurisdiction with the state courts, which proceeding, so authorized, would be regulated by the Act regulating the practice in the Federal Courts, approved June 1, 1872, 17 Stat. at L., 197.

If it should be conceded, which we do not intend to concede, that the power to purchase a site for the erection of a post-office expressed in the above Act of Mar. 12, 1872, when taken in connection with the language of the subsequent Acts, includes authority to acquire title by condemnation under the national power of eminent domain, we respectfully submit to the court, that the exercise of the power of eminent domain did not at all necessarily involve any judicial proceeding in the Circuit Court, nor in any other court. It is true that the 5th article of the Amendment to the Constitution provides that "Private property shall not be taken for public use without just compensation," but this does not require that the compensation shall be ascertained by a judicial tribunal.

See *Willyard v. Hamilton*, 7 Ohio, pt. 2, 111; *Kramer v. R. R. Co.*, 5 Ohio St., 140; *Bona-parts v. R. R. Co.*, 1 Bald., 223; Sedg. Stat. Const. L., 529, and cases there cited.

The taking of property without the consent of the citizen is in derogation of common right; unless it is clearly shown to be conferred by law, the authority does not exist. *R. R. Co. v. Kipp*, 46 R. L., 46.

The second point, upon which we allege error, is that the Circuit Court refused the demand of the plaintiff in error for a separate trial of the value of their estate in the property taken.

If the proceeding was, upon any title, properly in the circuit court, then the Act of June 1, 1872, 17 Stat. at L., 522, required the proceeding to conform to the requirements of the law of the State, in a like proceeding in a state court. We submit that the court below erred in denying this demand of the plaintiffs in error.

Giesy v. R. R. Co., 4 Ohio St., 308, 442.

NOTE.—*Eminent domain. Right to take private property for public use generally recognized. Fifth Amendment to Constitution applies only to Federal Government and not to States. See note to Withers v. Buckley*, 61 U. S., XV., 816.

See 1 Otto.

Mr. Edwin B. Smith, Asst. Atty-Gen., for defendant in error:

Though some have denied to the United States the right of eminent domain, we presume it will not be seriously contested now and here. It is inherent in the very idea of sovereignty; an inseparable incident of sovereignty. *Giesey v. C. W. & Z. R. R. Co.*, 4 Ohio St., 323, 324; *Bridge Co. v. Dix*, 6 How., 507, 531; 2 Kent, Com., 339 and *n. c.*; *Cooley*, Const. Lim., 526; *Sedg.* Const. L., 423; *Vatt.*, sec. 1, ch. 20, sec. 244; *New Orleans v. U. S.*, 10 Pet., 723; *Pollard v. Hagan*, 3 How., 223; 2 Story, Const., ch. 18, especially sec. 1146; *Williams v. School Dist.*, 33 Vt., 271.

Of course the right of the United States is superior to that of any State. *Dobbins v. Comrs.*, 16 Pet., 447.

The existence of a public necessity for new buildings in Cincinnati was declared by Congress when it passed the Act approved Mar. 12, 1872, ch. 45, 17 Stat. at L., 39, by Act approved June 10, 1872, ch. 415, 17 Stat. at L., 352, and by Act of March 2, 1873, ch. 227, 17 Stat. at L., 523.

The authority to purchase included the right of condemnation. 4 Kent, Com., 372; *Burt v. Ins. Co.*, 106 Mass., 364; 7 Ops. Attys-Gen., 114; but Congress, by the use of that term, indicated an expectation that it might and would be resorted to, and that the exigency justified it.

The courts and Legislatures of other States, in similar cases, have conceded the right of the United States thus to take property, and have aided in prompting its exercise.

Reddall v. Bryan, 14 Md., 444; *Gilmer v. Lime Point*, 18 Cal., 229; *Butt v. Ins. Co.*, 106 Mass., 356; *Ex parte Townshend*, 39 N. Y., 171.

But the right of a State to act as an agent of the Federal Government in actually making the seizure, has been denied by the Michigan court in *Trombley v. Humphrey*, 23 Mich., 471, 477, in which the opinion by Judge Cooley sustains this position with great cogency of argument.

If, then, the power to take be undeniable, and if the ground taken by Judge Cooley be correct, that it cannot be done through state tribunals, which have no authority to assess the compensation (23 Mich., 477), recourse must be had to the Federal Courts to complete the exercise of this constitutional right, in a case in which Congress declares an exigency requiring a resort to it to have arisen.

Ableman v. Booth, 21 How., 515-517 (62 U. S., XVI., 178); *Dickey v. Turnpike Co.*, 7 Dana, 113; 2 Story, Const., sec. 1146.

By the 2d section of article III. of the Constitution, the judicial power extends to all cases arising under the Federal Constitution and laws, and to controversies to which the United States shall be a party.

By the Judiciary Act of 1789, ch. 20, sec. 9, 1 Stat. at L., 77, the District and Circuit Courts were vested with jurisdiction concurrently with the state courts, of all suits at common law where the United States sue.

The 11th section of the same Act, 1 Stat. at L., 78, gives to the Circuit Courts original cognizance of all suits of a civil nature at common law or in equity where the United States is petitioner or plaintiff; and to the end that the jurisdiction thus conferred may be properly exercised (sec. 14, 1 Stat. at L., 81, 82), authorizes

the issue of certain specified processes, "And all other writs not specially provided for by statute which may be necessary," etc., "and agreeable to the principles and usages of law."

By section 25, 1 Stat. at L., 85, the final judgment or decree of state tribunals in any suit, etc., is subject to review in this court.

What is a suit? It is more comprehensive than "action."

Co. Litt., 291 a; 2 Burr. L. Dic., 955; *Wayman v. Southard*, 10 Wheat., 30; *Didier v. Davison*, 10 Paige, 516, 517.

It seems to be synonymous in this statute with "case." Wharton defines it to be "a petition to a court." Whart. Law Dic., 919. Bouvier gives the definition of Marshall, *Ch. J.*, in *Weston v. Charleston*, 3 Pet., 464, which is the authoritative exposition of this court of the meaning of that word in this connection. "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords. The modes of proceeding may be various, but if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit." Therefore, a writ of prohibition was held to be a suit, as a writ of right had previously been declared, in *Green v. Liler*, 8 Cranch, 229. It includes, "Not merely suits which the common law recognizes as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction from equity and admiralty, such as cases of partition, etc."

Parsons v. Bedford, 3 Pet., 447; *Cohens v. Va.*, 6 Wheat., 379; *Jones v. Seward*, 41 Barb., Sup. Ct., 272; *Clark v. Sohler*, 1 W. & M., 368.

So of a writ of *habeas corpus*. It is the petitioner's "suit in court to recover his liberty;" per Taney, *Ch. J.*, in *Holmes v. Jennison*, 14 Pet., 564, Story, McLean, Wayne and Catron, p. 567, concurring upon this point. It is the "pursuit of some claim, demand, or request." *Cohens v. Va.*, 6 Wheat., 407, 408.

Therefore, a libel for divorce has been held to be included within this term. *Kolb's case*. 4 Watts, 154.

Irrespective of congressional enactment as to the form of remedy pursued, the United States having the right to sue as a party in the Circuit Court, can there adopt the remedies and procedure employed by the State Courts in similar cases.

Wilson v. Mason, 1 Cranch, 45; *Parsons v. Bedford*, 3 Pet., 444; *Supervisors v. Rogers*, 7 Wall., 175 (74 U. S., XIX., 162); see Act of June 1, 1872, ch. 255, secs. 5, 6, 17 Stat. at L., 197.

No provision of local law confining a remedy to a State Court can affect a suitor's right to apply to the federal tribunals.

Hyde v. Stone, 20 How., 170 (61 U. S., XV., 874); *Payne v. Hook*, 7 Wall., 425 (74 U. S., XIX., 260); *R. R. Co. v. Whilton*, 13 Wall., 270 (80 U. S., XX., 571).

Therefore, the representative of the Government has the right to pursue, in the Circuit Court, the remedy given by the Legislature of Ohio, by Act of Feb. 15, 1873, 70 Ohio Laws 86; being substantially the same method as pointed out by Act of April 23, 1872, 69 Ohio Laws, 88-97.

The power to consolidate different suits, by various parties, brought at different times, so as to determine a general question by a single trial, is expressly given by Act of July 22, 1813, 3 Stat. at L., 21; R. S., ch. 18, sec. 921, p. 175.

The statute in Ohio, 69 Ohio Laws, 88, requires that the trial be had as to each parcel of land taken, not as to every interest in each parcel.

Mr. Justice Strong delivered the opinion of the court:

It has not been seriously contended during the argument that the United States Government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories and arsenals, for navy yards and light-houses, for custom-houses, postoffices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the Government, either mediately or immediately, and independent of the consideration whether they would escheat to the Government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vatt., ch. 20, 84; Bynk., lib. 2, ch. 15; Kent, Com., 338-340; Cooley, Const. Lim., 584, *et seq.* But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the Federal Government. That Government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the Federal Government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Ableman v. Booth*, 21 How., 523 [63 U. S., XVI., 175], Chief Justice Taney described in plain language the complex nature of our government, and the

existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish postoffices and to create courts within the States was conferred upon the Federal Government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken? In *Cooley, Const. Lim.*, 526, it is said:

"So far as the General Government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions—as must sometimes be necessary in the case of forts, light-houses and military posts or roads, and other conveniences and necessities of government—the General Government may exercise the authority as well within the States as within the territory under its exclusive jurisdiction; and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the Government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or of any other authority."

We refer also to *Trombley v. Humphrey*, 23 Mich., 471; *New Orleans v. U. S.*, 10 Pet., 723, *Dickey v. Turnpike Co.*, 7 Dana, 113; *McCullough v. Maryland*, 4 Wheat., 429.

It is true, this power of the Federal Government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the States, by virtue of their own right of eminent domain, have condemned lands for the use of the General Government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. Such was the ruling in *Gilmer v. Lime Pt.*, 18 Cal., 229, where lands were condemned by a proceeding in a state court and under a state law for a United States fortification. A similar decision was made in *Burt v. Ins. Co.*, 106 Mass., 356, where land was taken under a state law as a site for a postoffice and sub-treasury building. Neither of these cases denies the right of the Federal Government to have lands in the States condemned for its uses under its own power and by its own action. The question was, whether the State could take lands for any

other public use than that of the State. In *Trombley v. Humphrey*, 28 Mich., 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity, which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States Government in its own right, and by virtue of its own eminent domain. The Act of Congress of March 2, 1872, 17 Stat. at L., 89, gave authority to the Secretary of the Treasury to purchase a central and suitable site in the City of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States Courts, custom-house, United States depository, post-office, internal revenue and pension offices, at a cost not exceeding \$300,000; and a proviso to the Act declared that no money should be expended in the purchase until the State of Ohio should cede its jurisdiction over the site, and relinquish to the United States the right to tax the property. The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. It is true, the words "to purchase" might be construed as including the power to acquire by condemnation; for, technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference. That Congress intended more than this is evident, however, in view of the subsequent and amendatory Act passed June 10, 1872, 17 Stat. at L., 358, which made an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for the building. These provisions, connected as they are, manifest a clear intention to confer upon the Secretary of the Treasury power to acquire the grounds needed by the exercise of the national right of eminent domain, or by private purchase, at his discretion. Why speak of condemnation at all, if Congress had not in view an exercise of the right of eminent domain, and did not intend to confer upon the Secretary the right to invoke it?

But it is contended on behalf of the plaintiffs in error that the Circuit Court had no jurisdiction of the proceeding. There is nothing in the Acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the Circuit Court to secure it. Doubtless Congress might have provided a mode of taking the land, and determining the

compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court; but this, we think, was not necessary. The investment of the Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The Judiciary Act of 1789, 1 Stat. at L., 73, conferred upon the Circuit Courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of any Act of Congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a "suit" admits of no question. In *Weston v. Charleston*, 2 Pet., 464, Chief Justice Marshall, speaking for this court, said: "The term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit." A writ of prohibition has, therefore, been held to be a suit; so has a writ of right, of which the Circuit Court has jurisdiction, *Green v. Lister*, 8 Cranch, 229; so has *habeas corpus*; *Holmes v. Jennison*, 14 Pet., 564. When, in the 11th section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the Circuit Courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least quasi judicial. Certainly no other mode than a judicial trial has been provided.

It is argued that the assessment of property for the purpose of taking it is in its nature like the assessment of its value for the purpose of taxation. It is said they are both valuations of the property to be made as the Legislature may

prescribe, to enable the Government, in the one case, to take the whole of it, and in the other to take a part of it for public uses; and it is argued that no one but Congress could prescribe in either case that the valuation should be made in a judicial tribunal or in a judicial proceeding, although it is admitted that the Legislature might authorize the valuation to be thus made in either case. If the supposed analogy be admitted, it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law; and hence, as the Government is a suitor for the property under a claim of legal right to take it, there appears to be no reason for holding that the proper Circuit Court has not jurisdiction of the suit, under the general grant of jurisdiction made by the Act of 1789.

The second assignment of error is, that the Circuit Court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lessees of one of the parcels sought to be taken, and they demanded a separate trial of the value of their interest; but the court overruled their demand, and required that the jury should appraise the value of the lot or parcel, and that the lessees should in the same trial try the value of their leasehold estate therein. In directing the course of the trial, the court required the lessor and the lessees each separately to state the nature of their estates to the jury; the lessor to offer his testimony separately, and the lessees theirs, and then the Government to answer the testimony of the lessor and the lessees; and the court instructed the jury to find and return separately the value of the estates of the lessor and the lessees. It is of this that the lessees complain. They contend that, whether the proceeding is to be treated as founded on the national right of eminent domain or on that of the State, its consent having been given by the enactment of the State Legislature of Feb. 15, 1873 (70 Ohio Laws, 36, sec. 1), it was required to conform to the practice and proceedings in the courts of the State in like cases. This requirement, it is said, was made by the Act of Congress of June 1, 1872. 17 Stat. at L., 197. But, admitting that the court was bound to conform to the practice and proceedings in the State Courts in like cases, we do not perceive that any error was committed. Under the laws of Ohio, it was regular to institute a joint proceeding against all the owners of lots proposed to be taken (*Giesy v. R. R. Co.*, 4 Ohio St., 308), but the 8th section of the state statute gave to "the owner or owners of each separate parcel" the right to a separate trial. In such a case, therefore, a separate trial is the mode of proceeding in the State Courts. The statute treats all the owners of a parcel as one party, and gives to them collectively a trial separate from the trial of the issues between the Government and the owners of other parcels. It hath this extent; no more. The court is not required to allow a separate trial to each owner of an estate or interest in each parcel, and no consideration of justice to those owners would be sub-

See 1 Otto.

served by it. The Circuit Court, therefore, gave to the plaintiffs in error all, if not more than all, they had a right to ask.

The judgment of the Circuit Court is affirmed.

Mr. Justice Field, dissenting:

Assuming that the majority are correct in the doctrine announced in the opinion of the court; that the right of eminent domain within the States—using those terms not as synonymous with the ultimate dominion or title to property, but as indicating merely the right to take private property for public uses—belongs to the Federal Government, to enable it to execute the powers conferred by the Constitution; and that any other doctrine would subordinate, in important particulars, the national authority to the caprice of individuals or the will of State Legislatures, it appears to me that provision for the exercise of the right must first be made by legislation. The Federal Courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property; and I do not find any statute of Congress conferring upon them such authority. The Judiciary Act of 1789, 1 Stat. at L., 73, only invests the Circuit Courts of the United States with jurisdiction, concurrent with that of the State Courts, of suits of a civil nature at common law or in equity; and these terms have reference to those classes of cases which are conducted by regular pleadings between parties, according to the established doctrines prevailing at the time in the jurisprudence of England. The proceeding to ascertain the value of property which the Government may deem necessary to the execution of its powers, and thus the compensation to be made for its appropriation, is not a suit at common law or in equity, but an inquisition for the ascertainment of a particular fact as preliminary to the taking; and all that is required, is that the proceeding shall be conducted in some fair and just mode, to be provided by law, either with or without the intervention of a jury, opportunity being afforded to parties interested to present evidence as to the value of the property and to be heard thereon. The proceeding by the States, in the exercise of their right of eminent domain, is often had before commissioners of assessment or special Boards, appointed for that purpose. It can hardly be doubted that Congress might provide for inquisition as to the value of property to be taken by similar instrumentalities; and yet, if the proceeding be a suit at common law, the intervention of a jury would be required by the Seventh Amendment to the Constitution.

I think that the decision of the majority of the court in including the proceeding in this case under the general designation of a suit at common law, with which the Circuit Courts of the United States are invested by the 11th section of the Judiciary Act, goes beyond previous adjudications, and is in conflict with them.

Nor am I able to agree with the majority in their opinion, or, at least, intimation, that the authority to purchase carries with it authority to acquire by condemnation. The one supposes an agreement upon valuation, and a voluntary conveyance of the property; the other implies a compulsory taking, and a contestation as to the value. *Beekman v. R. R. Co.*, 3

Paige, 75; *R. R. Co. v. Davis*, 2 Dev. & B., 465; *Willyard v. Hamilton*, 7 Ohio (2 pt.), 111; *Livingston v. Mayor of N. Y.*, 8 Wend., 85; *Koppikus v. State Cap. Comrs.*, 16 Cal., 249.

For these reasons I am compelled to dissent from the opinion of the court.

Cited—94 U. S., 320; 96 U. S., 19; 109 U. S., 519; 3 Hughes, 69; 89 N. J. L., 31; 66 How. Pr., 522; 96 N. Y., 234-236; 125 Mass., 315; 28 Am. Rep., 233.

UNITED STATES, *Plff.*,

v.

JOHN W. NORTON.

(See S. C., 1 Otto, 566-569.)

Postal money-order system—embezzlement of moneys—limitation.

1. The Act to establish a postal money-order system is not a revenue law within the meaning of the 3d section of the Act of 1804.

2. On an indictment for embezzlement of moneys belonging to the money-order office, the defendant cannot be prosecuted, tried or punished, unless the indictment shall have been found within two years from the time of committing the offenses.

3. The indictment is not for crimes arising under the revenue laws.

[No. 518.]

Argued Mar. 6, 1876. Decided Mar. 27, 1876.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. Edwin B. Smith, Asst. Atty-Gen., for plaintiff.

Mr. Abram Wakeman, for defendant.

Mr. Justice Swayne delivered the opinion of the court:

It appears by the record that Norton was indicted for the embezzlement at different times of money belonging to the money-order office in the City of New York, he being a clerk in that office when the crimes were committed.

The indictment was found on the 21st of February, 1874. He pleaded that the several offenses did not arise, exist or accrue within two years next before the finding of said indictment. To this plea the United States demurred. Upon the point thus presented, as to the sufficiency of the plea, the judges were divided in opinion.

The indictment was founded upon the 11th section of the "Act to Establish a Postal Money-Order System," passed May 17, 1864. 13 Stat. at L., 76.

The "Act for the Punishment of Certain Crimes Against the United States," of the 30th of April, 1790, 1 Stat. at L., 119, sec. 32, declares, "Nor shall any person be prosecuted, tried or punished for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense or incurring the fine or forfeiture aforesaid."

The Act of the 26th of March, 1804, "in addition to the Act entitled 'An Act for the Punishment of Certain Crimes Against the United

States,'" enacts, 2 Stat. at L., 290, sec. 3, "That any person guilty of crimes arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, tried and punished, provided the indictment or information be found at any time within five years after committing the offense or incurring the fine or forfeiture; any law or provision to the contrary notwithstanding."

The substantial question presented for our determination is: which of these two provisions applies as a bar to a prosecution for the offenses described in the indictment? The solution of this question depends upon the solution of the further question, whether the "Act to Establish a Postal Money-Order System" is a revenue law within the meaning of the 3d section of the Act of 1804.

The offenses charged were crimes arising under the Money-Order Act. The title of the Act does not indicate that Congress in enacting it had any purpose of revenue in view. Its object, as expressly declared at the outset of the 1st section, was "To promote public convenience, and to insure greater security in the transmission of money through the United States mails." All moneys received from the sale of money-orders, all fees received for selling them, and all moneys transferred in administering the Act, are "to be deemed and taken to be money in the Treasury of the United States." The Postmaster-General is authorized to allow the deputy-postmasters at the money-order offices, as a compensation for their services, not exceeding one third of the whole amount of fees received on money-orders issued," and at his option, in addition, "one eighth of one per cent. upon the gross amount of orders paid at the office." He was also authorized to cause additional clerks to be employed, and paid out of the proceeds of the business; and to meet any deficiency in the amount of such proceeds during the first year, \$100,000, or so much of that sum as might be needed, was appropriated.

There is nothing in the context of the Act to warrant the belief that Congress, in passing it, was animated by any other motive than that avowed in the 1st section. A willingness is shown to sink money, if necessary, to accomplish that object.

In no just view, we think, can the statute in question be deemed a revenue law.

The lexical definition of the term "revenue" is very comprehensive. It is thus given by Webster: "The income of a nation, derived from its taxes, duties or other sources, for the payment of the national expenses."

The phrase "other sources" would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the Patent Office in excess of its expenditures, and those of the Postoffice Department, when there should be such excess as there was for a time in the early history of the Government. Indeed, the phrase would apply in all cases of such excess. In some of them the result might fluctuate; there being excess at one time, and deficiency at another.

It is a matter of common knowledge, that the appellative "revenue laws" is never applied to the statutes involved in these classes of cases.

The Constitution of the United States, article

1, sec. 7, provides that "All bills for raising revenue shall originate in the House of Representatives."

The construction of this limitation is practically well settled by the uniform action of Congress. According to that construction, it "Has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which incidentally create revenue." Story, Const., sec. 880, "Bills for raising revenue" when enacted into laws, become revenue laws. Congress was a constitutional body sitting under the Constitution. It was, of course, familiar with the phrase "bills for raising revenue," as used in that instrument, and the construction which had been given to it.

The precise question before us came under consideration of *Mr. Justice Story*, in *The U. S. v. Mayo*, 1 Gall., 397. He held that the phrase "revenue laws," as used in the Act of 1804, meant such laws "As are made for the direct and avowed purpose of creating revenue or public funds for the service of the Government." The same doctrine was re-affirmed by that eminent judge, in *The U. S. v. Cushman*, 2 Sumn., 426.

These views commend themselves to the approbation of our judgment.

The cases of *U. S. v. Bromley*, 12 How., 88, and *Warner v. Fowler*, 4 Blatchf., 311, are relied upon by the counsel for the United States. Both those cases are clearly distinguishable, with respect to the grounds upon which the judgment of the court proceeded, from the case before us. It is unnecessary to remark further in regard to them.

It will be certified, as the answer of this court to the circuit court, that the indictment against Norton charges offenses for which, under the limitation provided in the 32d section of the Act of Congress approved April 30, 1790, entitled "An Act for the Punishment of Certain Crimes Against the United States," the defendant cannot be prosecuted, tried or punished, unless the indictment shall have been found within two years from the time of the committing of the offenses; and that the indictment is not for crimes arising under the revenue laws, within the intent and meaning of the 3d section of the Act approved March 28, 1804, entitled "An Act in Addition to the Act Entitled 'An Act for the Punishment of Certain Crimes Against the United States.'"

HENRY MEYER ET AL., *Plffs. in Err.*,

v.

CHESTER A. ARTHUR, COLLECTOR OF THE
PORT OF NEW YORK.

(See S. C., 1 Otto, 570-577.)

*Construction of law in regard to duties on im-
ports.*

1. White lead, nitrate of lead, oxide of zinc and dry and orange mineral are not manufactures of metals under the Act of June 6, 1872.

2. When the Act speaks of manufactures of metals, it obviously refers to manufactured articles in which metals form a component part.

[No. 183.]

Argued Mar. 22, 1876. Decided Apr. 10, 1876.

See 1 OTTO.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

It appeared in evidence upon the trial before the jury, that plaintiffs were, during the year 1872, and ever since have been, partners under the firm name of H. & F. W. Meyer, and the defendant was, during the same period, the Collector of Customs of the United States at the Port of New York.

That, subsequent to August 1, 1872, and in that year, plaintiffs, as such firm, imported from foreign ports, into the Port of New York, certain merchandise, known in trade as white lead, nitrate of lead, oxide of zinc, dry and orange mineral; that, upon the entry of said articles at said port, defendant, as such Collector, assessed and collected from the plaintiffs, as such firm, the duties payable thereon under the existing laws, passed prior to June 6, 1872, to wit: that on and after August 1, 1872, there should be a reduction of 10 per cent. upon the existing duties upon "All other metals not herein otherwise provided for, and on all manufactures of metals of which either of them is the component part of chief value, excepting percussion-caps, watches, jewelry and other articles of ornament."

That plaintiffs paid the alleged excess of duty under protest, claiming that the merchandise imported was entitled to the said reduction of duty under the law above cited, upon the ground that these articles were respectively manufactures of lead or zinc, and brought this action within the proper time to recover said ten per centum, claimed to have been illegally exacted. The requirements of the laws of the United States relative to protest, appeal and suit were duly complied with by the plaintiffs. The amount to be recovered, if plaintiffs are entitled to recover, is, on oxide of zinc imported, \$674.72; on nitrate of lead, \$81.40; and on orange mineral, \$17.77, etc., in all, the sum of \$1,184.61, with interest at seven per cent. per annum, from Oct. 11, 1872.

Oxide of zinc is manufactured in European establishments, as follows:

Sheets of zinc ordinarily sold in commerce are placed in retorts. The face of the retort has an opening large enough to admit the sheet. The backs of the retorts are inclosed in a furnace, and the retorts are heated to a white heat by bituminous coal. The action of the heat vaporizes the spelter, which is entirely consumed. The vapor passes out of the mouth of the retort into large pipes, into which currents of air are forced. The vapor combines with the oxygen of the air, and becomes white, snow-like flakes. The current bears these flakes along through the pipes, which terminate in long chambers. At the mouth of the pipes bags are suspended, in which the flakes are caught; no further process is required.

The oxide of zinc in suit was manufactured in this way.

Nitrate of lead is a chemical combination of lead and nitric acid. Lead previously melted and cooled, is placed in a vessel filled with dilute heated nitric acid, and subjected to a slight additional heat. The nitrate of lead is formed in crystals upon the sides of the vessel. Its form, as a commodity in the market, is ordinarily that of a white opaque crystal.

Orange or red lead is made by roasting dry white lead in a furnace, and exposing it to the air, which is admitted into the heated receptacle. By this process, the white lead loses a portion of its carbonic acid, and absorbs oxygen from the air. Orange or red lead is used by paper-stainers, manufacturers of wall-paper and for highly colored cards.

White lead is manufactured as follows:

Small earthen pots are partially filled with vinegar or acetic acid; pig-lead of commerce, cast into round perforated plates, technically called "buckles," are placed in the pots above the acid and not in contact with it. The pots thus filled are placed in a chamber upon a layer of spent tan bark. Alternate layers of pots and tan bark are filled up to the roof of the chamber; air is introduced into the chamber through flues and natural crevices. The bark contains moisture, becomes heated and evolves carbonic acid. By chemical action, the lead is oxidized by the oxygen of the air, and then, in combination with the carbonic acid, becomes a carbonate of the oxide of lead.

The acetic acid does not touch the lead, but its presence facilitates the process of oxidation.

In the course of three months the lead has generally become entirely oxidized, of a white color, but retaining its original shape of a buckle. It is then crushed in rollers, any uncorroded pieces of lead having first been separated from it, then ground and dried. Then, if it is to be sold in oil, it is re-ground with linseed oil.

An analysis of the articles in question gave the following results:

<i>Oxide of Zinc.</i>	
Zinc	79.98
Oxygen	19.67
Insoluble matter and impurities.....	.35
	100.00

<i>Orange Mineral.</i>	
Lead	90.69
Oxygen with traces of carbonic acid...	9.31
	100.00

<i>Dry White Lead.</i>	
Lead.....	80.11
Oxygen.....	6.19
Carbonic acid.....	11.39
Water.....	2.81
	100.00

<i>White Lead in Oil.</i>	
*Dry white lead.....	92.92
Linseed oil.....	7.08
	100.00

<i>Nitrate of Lead.</i>	
Lead	61.90
Oxygen.....	4.90
Nitric acid.....	82.85
Moisture74
Traces.....	.11
	100.00

The metals named in the respective analyses

*This dry white lead gave the following result:	
Lead	80.20
Oxygen.....	6.20
Carbonic acid.....	11.21
Water.....	2.39
	100.00

are the components of chief value. There is no metallic zinc or metallic lead, in the ordinary sense of these words; that is, no metallic zinc or metallic lead of commerce, in either of these articles. The ingredients in each of the articles unite by reason of their chemical affinity. Oxide of zinc has a different specific gravity, density and color from metallic zinc. White lead and nitrate of lead have each a different specific gravity, density and color from metallic lead.

The manufacture of orange or red lead and white lead, either dry or in oil, is carried on by the same persons in the same establishments, commencing with the corrosion of the lead and stopping the manufacture at certain stages, according to the product desired.

Oxide of zinc and white lead are principally used as pigments. Nitrate of lead is used largely in dyeing and in the manufacture of pigments, and as a disinfectant and for other purposes. It is never ground in oil. Oxide of zinc, white lead and red lead are imported both dry and ground in oil. They must be ground in oil before they can be used as paints. The oxide of zinc and the red lead in the invoices in controversy were dry, and the white lead was ground in oil, and were all to be used in the manufacture of or as pigments.

All the articles in suit are generally dealt in by persons connected with the manufacture and sale of pigments, and they are staples of trade in that line of commerce. Nitrate of lead, however, is principally dealt in by wholesale druggists; metal dealers do not usually deal in any of these articles.

It was shown that the method of the manufacture of white lead has been substantially the same for upwards of twenty-five years.

Mr. Edward Hartley, for plaintiffs in error:

What is the true intent and meaning of the words in the Act of June 6, 1872, sec. 2, "Manufactures of metals, of which either of them is the component part of chief value."

As these words describe nothing, technically, they are evidently used in their ordinary sense and not as terms of trade or art.

Lottimer v. Smythe, 17 Int. Rev. Rec., pp. 18, 14.

Manufactures of metals are of such diverse kinds, engaging the industry and skill of so many trades, that no one class of dealers can limit those words to its own productions.

See, Webster and Worcester; *Lawrence v. Allen*, 7 How., p. 793; *Corning v. Burden*, 15 How., p. 267; 2 Bouv., 101; *King v. Wheeler*, 3 B. & Ald., 845, 850; *Schriefer v. Wood*, 5 Blatchf., 215.

White lead, oxide of zinc, etc., are manufactures; and being made directly from raw lead or zinc by a continuous process, are manufactures of metal, that being the raw material from which they are produced. Metal is of chief value.

They are not only made from metal, but contain nothing else except properties derived from the atmosphere. They also form one of the most important branches of manufacture in which metals are used as raw materials.

The objection of defendant that the articles in suit are not in a metallic form, and have been converted by oxidation into substances in

which the identity of the metal is lost, is, under the above cases and definitions, immaterial. Are they any the less made of metal, and is not metal the component of chief value entering into their manufacture?

Refined distinctions in the construction of tariffs have always been discountenanced. This court said in *Two Hundred Chests of Tea*, 9 Wheat., 438, that the law did not suppose our merchants to be naturalists, geologists or botanists.

The Act of 1872 is entitled an "Act to Reduce Duties on Imports," which declared purpose must be considered in interpreting its provisions.

Smythe v. Fisk (ante, 47), No. 399, Oct. Term, 1874; *U. S. v. Fisher*, 2 Cranch, 358; *U. S. v. Palmer*, 3 Wheat., 631.

As when the Act was passed, the industrial interests of the country called for reduction of taxes, and as the bill was remedial, responding to the call, the court must so construe the law as to carry out its purpose.

"All metals and all manufactures of metals, etc.," are provided for in section 2, with certain exceptions, which do not include the articles in suit. When Congress has made exceptions, it negatives the idea of any other exceptions than those directly made.

Tinkham v. Tapscott, 17 N. Y., 141; *Bend v. Hoyt*, 18 Pet., 271, 272.

Mr. Edwin B. Smith, Asst. Atty-Gen., for defendant in error.

It is of no consequence what these substances are, chemically or scientifically speaking, unless they are also classified commercially in the same way as in chemistry or science; for it is, primarily, the commercial language, designation, meaning and classification that is adopted in tariff Acts, although it may not be scientifically correct.

U. S. v. Casks of Sugar, 8 Pet., 279; *Elliott v. Swartwout*, 10 Pet., 151; *Two Hundred Chests of Tea*, 9 Wheat., 438; *Curtis v. Martin*, 3 How., 109; *Lawrence v. Allen*, 7 How., 793; *U. S. v. Breed*, 1 Sumn., 159; *U. S. v. Sarchet*, Gilp., 273; *Maillard v. Lawrence*, 16 How., 261.

Metals are elementary mineral substances; so soon as they combine with aught else, they cease to be metals. Nor is white lead a manufacture of lead, within the meaning of the Tariff Act. It is a distinct article, in which the lead of commerce is not present. In white lead, there is no lead. It is carefully extracted, after exposure for months to acids under the peculiar conditions detailed. By reversing the process, burning out the carbon and oxygen, lead can be reproduced, and the article cease to be white lead; but so long as it continues white lead, the lead of commerce does not appear in it. True, white lead is produced from lead, but it is not a manufacture of lead. If chemically tested, a multitude of articles would be found to possess a metallic basis or ingredient; but they could not justly, for that reason only, be considered as within the meaning of the Act of June 6, 1872, making the 10 per cent. reduction here claimed.

In the chemical processes resorted to, to make white lead, all the merchantable and commercial characteristics of the metal lead are destroyed.

We have dwelt on this article because all the

See 1 Otto.

others are still further removed, by additional chemical processes, from their metallic bases; so, of course, if white lead is not subject to the 10 per cent. reduction, they would not be.

Mr. Justice Bradley delivered the opinion of the court:

This is a suit to recover import duties alleged to have been unlawfully exacted. The articles on which they were charged were white lead, nitrate of lead, oxide of zinc and dry and orange mineral, imported after the first day of August, 1872. By the 2d section of the Act to reduce duties on imports, passed June 6, 1872, 17 Stat. at L., 280, it was provided that on and after the first day of August, 1872, only ninety per cent. of the duties theretofore imposed should be levied upon certain enumerated articles imported from foreign countries; amongst which were the following, as described in the words of the Act:

"All metals not herein otherwise provided for, and all manufactures of metals of which either of them is the component part of chief value, excepting percussion-caps, watches, jewelry and other articles of ornament;" with a proviso excepting certain kinds of wire-ropes, and chains made of steel wire.

The plaintiffs contend that white lead, nitrate of lead, oxide of zinc and dry and orange mineral, are "manufactures of metals." Whether they are or not is the question at issue.

Unless some special usage to the contrary can be shown, the construction relied on by the plaintiffs is clearly wrong.

When the Act speaks of manufactures of metals, it obviously refers to manufactured articles in which metals form a component part. When we speak of manufactures of wood, of leather or of iron, we refer to articles that have those substances respectively for their component parts, and not to articles in which they have lost their form entirely, and have become the chemical ingredients of new forms. The qualification which is added to the phrase "manufactures of metals," namely: "manufactures of metals of which either of them" (that is, either of the *metals*) "is the component part of chief value," corroborates this view.

If the plaintiffs could show a different legislative usage, there would be some plausibility in their position. But this they have failed to do. So far as our attention has been called to the usage, it corroborates the view above expressed. For example: in the Act of March 2, 1861, 12 Stat. at L., 182, to provide for the payment of outstanding treasury notes, etc., the import duties to be levied on lead, copper and zinc, in various forms, are imposed by the 8th section; whilst those on white lead, oxide of zinc, red lead, litharge, etc., are separately provided for in the 9th section. And in the Act passed July 14, 1862, 12 Stat. at L., 545, for increasing duties, etc., the duties on iron in different forms, and on "all manufactures of iron," are provided for in section 3, and those on copper and "manufactures of copper," and on zinc and lead, in section 4; whilst those "on copperas, green vitriol, or sulphate of iron," "on white and red lead," and "oxide of zinc," are provided for in section 7; and those on "litharge" and "verdigris," in section 5. In none of these cases is there an intimation that the

classes of articles named lap on to each other, or that one duty imposed is exceptional to another; and yet, if the position of the plaintiffs is correct, copperas is a manufacture of iron; white and red lead and litharge are manufactures of lead, and verdigris is a manufacture of copper.

The truth is, that, in the nature of things, a metal and its oxide or sulphate are totally distinct and unlike. Any substance subjected to a chemical change by uniting with another substance loses its identity; it becomes a different mineral species. The basis of common clay is the metal, aluminium, and the basis of lime is the metal, calcium. But no one would think of calling clay and lime, metals; nor, if artificially made, would he call them manufactures of metals. They have lost all their metallic qualities. In just the same manner, iron ceases to be iron when it becomes rust, which is oxide of iron; or when it becomes copperas, which is sulphate of iron. None would think of calling blue vitriol copper. So white lead, nitrate of lead, oxide of zinc, and dry or orange mineral, are not metals; they have no metallic qualities. In the poverty of language, they have no distinct names, it is true, as lime and clay and vitriol have; but each is designated by a scientific *periphrasis*, in which the name of the metal which forms one of its chemical elements is used. This use of the name has probably been one cause of the confusion which has arisen on the subject.

The judgment must be affirmed.

Cited—96 U. S., 133.

STATE OF FLORIDA, *Complt.*,

v.

EDWARD C. ANDERSON, JR., DANIEL
P. HOLLAND ET AL.

(See S. C., 1 Otto, 683-690; see, also, 667-683.)

*Railroad, possession of, when ordered delivered—
when subject to claims and advances.*

1. As this court has not cognizance of the principal litigation in the case, and cannot make any final disposition of the property, being only called upon to decide on the conflicting rights of the State, and the respective defendants, to the immediate possession of it, the only thing left for the court to do, it having exercised all the jurisdiction it was called upon to exercise, is to order the receiver to deliver the property to the State, and to dispose of any moneys in the hands of the receiver.

2. The railroad between Lake City and Jacksonville belonging to the Florida Central R. R. Co. will be directed to be delivered to said company, but subject to a claim on the part of the State to any balance which may be still due for the advances made by the said receiver, after all proper allowances to said company upon a due adjustment of the accounts between it and the receiver.

3. The proper allowance to the clerk for the custody of money paid into court, is one per cent.

4. Funds which have accrued from the operations of a railroad while in the hands of a receiver and now in the registry of the court, should be handed over to the same parties to whom the railroad itself was properly deliverable.

5. The funds in this case delivered to the State of Florida.

6. Certain claims and costs and fees, ordered paid from the funds, before they are paid over.

[No. 8. Orig.]

NOTE.—Lien for purchase money. See note to Bayley v. Greenleaf, 20 U. S. (7 Wheat.), 46.

*Argued Jan. 11, 18, and Mar. 28, 1876. Decided
May 1, 1876.*

IN CHANCERY.

Subsequent to the argument of the main question involved in the above case (see, *ante*, 290), the following proceedings, among others, were had:

A motion having been filed by Gibbs, Jan. 10, 1875, to discharge the receiver from the care of the road between Quincy and Chattahoochee, and to turn the same over to him. This motion was argued Jan. 11, 1876, by Mr. E. N. Dickerson in support thereof.

Jan. 14, a motion was filed by Holland to continue the receiver for a certain time until certain ends were accomplished, and thereafter to turn the property over to him. This motion was argued Jan. 18, together with a motion which had been made to deliver the possession of the property to an agent, one Eagan, appointed by the State for that purpose. Mr. Carpenter supported the first of these motions and opposed the second. Mr. Bisbee opposed the first and supported the second.

Feb. 28, leave was granted to the J. P. & M. R. R. Co., to intervene and set up title to the road from Lake City to Chattahoochee.

On the same day a petition was filed by Holland for an order on the receiver to pay over money in his possession upon the judgment of Holland. On the same day a petition was also filed by E. C. Anderson, Jr., and others, for further direction under the decree of the court.

Leave was granted to Mr. Bisbee to file an answer to the petitions.

Mar. 28, the motion to discharge the receiver was argued by Mr. Bisbee in support of the same, and by Mr. M. H. Carpenter, of counsel for Holland, in opposition thereto, and in support of his motion to continue the receiver.

The petition of E. C. Anderson, Jr., *et al.*, for further directions, was argued by Mr. W. W. Boyce in support of the same. The petition of the J. P. & M. R. R. Co. was argued by Mr. W. G. M. Davis in support of the same, and by Mr. D. P. Holland in opposition thereto. Mr. Bisbee argued in support of the motion to discharge the receiver, and in opposition to all other motions.

Mr. Justice Bradley delivered the opinion of the court:

By the decree made in this case, in December last, we granted an injunction against the defendants to restrain them from hindering, interfering with or disturbing the State of Florida in the possession, management or control of the Jacksonville, Pensacola and Mobile Railroad, extending from Lake City westwardly to or beyond the Chattahoochee River, and from Tallahassee to St. Mark's; saving to Edward C. Anderson, Jr., and others, holders of the first mortgage bonds, their right to demand and receive from the State of Florida, or the trustees of the internal improvement fund of said State, the amount due or to become due on their bonds; and saving to the defendant, Daniel P. Holland, the right to contest the bonds given by said Company in exchange for bonds of the State of Florida to the amount of \$3,000,000, and any right of redemption which the said Holland might have in said property. The

rights claimed by Holland have since been fully contested by him in the state courts, and their decision is adverse thereto. The Supreme Court of Florida has adjudged that the sale of the railroad under Holland's execution was null and void as against the State, and gave him no right to the possession or income thereof. This decision relieves this court from any embarrassment as to the disposition of the property. The State is the only proper party to receive it.

This suit was brought against Anderson and Company and Holland, to prevent them from intermeddling with the property whilst being pursued by the State in due course of litigation in the state courts. It was in part ancillary to the relief sought there. When brought, neither of the defendants was a party to that litigation, all being citizens of Georgia, and not personally amenable to the courts of Florida, except by their own consent, or by being accidentally found there. Since then, however, Holland has voluntarily made himself a party to the suit in the state court, and has procured the decision referred to. By that decision, it is determined that the bonds given by the railroad company to the State in exchange for state bonds in 1870 are valid to the extent of being security to the purchasers of the state bonds for the amount justly due to them, and create a statutory lien on the railroad prior to the judgment obtained by Holland or any other party, and entitle the State to seize and sell the same; and Holland has, therefore, been perpetually enjoined by the state court from interfering with the State in the possession of the road and its appurtenances. The majority of the Supreme Court went even further, and held, that, by the laws of Florida, the railroad could not be levied on and sold under an execution at all.

Under these circumstances, and in view of the decree already made by this court, it would be improper to direct the delivery of the property to Holland. As this court has not cognizance of the principal litigation in the case, and cannot make any final disposition of the property—being only called upon to decide on the conflicting rights of the State and the respective defendants to the immediate possession of it—the only thing left for the court to do (having exercised all the jurisdiction it was called upon to exercise) is to order the receiver to deliver the property to the State, and to dispose of any moneys in the hands of the receiver.

Holland strenuously insists that the property ought to be restored to him, because he was in possession of it at the commencement of the suit. But he went into possession after the commencement of the suit in the state court, and we have expressly decided that his possession was inequitable; and, before the appointment of a receiver by this court, he had been deprived of that possession by the action of the state court. The receiver appointed by that court had taken the property out of his hands. It is true, we had required Holland to account to us for the income, and regarded the seizure of the property as interfering with that jurisdiction which the State itself, the complainant here, and also the complainant and moving party in the state court, had requested us to assume. We, therefore, felt justified in appointing a receiver to take full possession of the property; and the state court has since been held to have

See 1 Otto.

had no jurisdiction over the subject-matter. But there is nothing in these circumstances that gives Holland any right to reclaim that possession when it may be resigned by our receiver. Holland's claim has been overruled by both the judgment of this court and of the state courts; and it would be worse than a vain and idle ceremony to deliver the property to him after these adjudications. It would be plunging the whole property into a new sea of litigation.

The claim of Gibbs to the possession of the road west of Quincy has more plausibility. It seems that, at the commencement of this suit, Holland had possession of that part as a tenant of Gibbs. But the road is certainly a part of the entire line, and the title of Gibbs is disputed by the State, which claims that the statutory lien of the bonds issued in 1870 is paramount to all others; and neither Gibbs, nor any person holding under him, was in possession when the receiver was appointed by this court. Our receiver, in taking possession, did not take it from his hands, but from the hands of the receiver appointed by the state court, in the manner before adverted to. We think that no injustice will be done, but that the interest of all parties will be subserved, by delivering the road entire to the agent appointed by the State to receive the property, subject to the right on the part of Gibbs to institute legal proceedings against said agent for testing the question as to his right of possession. That part of the road, therefore, will be delivered to said agent subject to this right, so that Gibbs may not be embarrassed by being placed in the position of having to bring suit against the State. The question of his right is a question of law which can be submitted to the courts of Florida without much delay or expense.

The counsel of Gibbs object that he is not a party to this suit, and his rights ought not to be compromised by the judgment or action of the court; and they insist that he ought to be placed *in statu quo ante bellum*. We do not decide upon his rights; we leave them just as they were: and as to the possession, we place it in the hands of the party at whose instance the receiver was appointed who had possession when it was assumed by this court.

As to the railroad between Lake City and Jacksonville belonging to the Florida Central Railroad Company, and which is still in the possession of our receiver for the purpose of obtaining payment of advances made by him in making necessary improvements on the road, as the amount due for those advances has been much reduced, we see no reason for further withholding the possession from the Florida Central Railroad Company. That road, therefore, will be directed to be delivered to said Company, but subject to a claim on the part of the State to any balance which may be still due for the advances made by the said receiver, after all proper allowances to said Company upon a due adjustment of the accounts between it and the receiver.

The court has taken into consideration various other matters necessary to be adjusted; and the result to which it has come will be expressed in the decree now made, which will not require further explanation. The balance of moneys that may remain in the hands of the receiver, after all proper payments and allow-

ances will be directed to be paid into the registry of this court for future disposition upon the final settlement and confirmation of the receiver's accounts.

The claim of Anderson and others remains, as regards the possession and sale of the road, exactly as when the former decree was made. The fact that some of their bonds have matured does not change their position in that respect.

The application of the Jacksonville, Pensacola, and Mobile Railroad Company for the possession of the road as against the State is not entitled to any consideration whatever. When the Company shall have paid the balance of purchase money due for the road, and the interest on its bonds, it will be time enough for it to put forth its pretensions.

The following order will be entered:

THE STATE OF FLORIDA

v.

EDWARD C. ANDERSON, JR., DANIEL P. HOLLAND AND OTHERS.

On Bill in Equity. Original Docket No. 8, Oct. Term, 1875.

And now, on this first day of May, A. D. 1876, the court being advised of certain proceedings and decrees had and made by and before the Circuit Court for Duval County, in the State of Florida, and by and before the Supreme Court of said State in the cause mentioned in the bill and pleadings in this case, wherein the State of Florida and the trustees of the internal improvement fund of said State were plaintiffs, and the Jacksonville, Pensacola and Mobile Railroad Company, and others, were defendants, whereby it hath been held and adjudged that the three thousand bonds for \$1,000 each, issued by the said Company in the year eighteen hundred and seventy, in exchange for state bonds, are valid and binding, and create a statutory lien upon the railroad and property of said Company, and that by virtue thereof the said State is entitled to take possession of said property and sell the same, not only to raise and pay the unpaid purchase money mentioned in the said original bill, but also what may be justly due on said bonds; and that the sale of said railroad and property under execution at the suit of the defendant, Daniel P. Holland, was void and of no effect, and gave him no right or title, as against the said State, to the possession of said railroad and property, or to the income, tolls or revenues thereof; and it appearing that the possession of that part of said railroad between Quincy and the Appalachicola River is claimed by one James G. Gibbs, but is a part of the said Jacksonville, Pensacola and Mobile Railroad, and was not in possession of said Gibbs when the receiver was appointed by this court, nor of any person claiming under said Gibbs, and that his right to the possession thereof is denied by the said State as the holder of said bonds; and the said State of Florida, through its executive and the said trustees of the internal improvement fund, having deputed Dennis Egan, the Commissioner of Lands and Immigration of said State, to receive the said railroad and property from the receiver of this court:

Therefore, it is ordered and decreed that Robert Walker, the Receiver appointed by this court, do on or before the first day of June next,

deliver the said railroad and all its appurtenances, extending from Lake City to the Appalachicola River, and from Tallahassee to St. Marks, and all the rolling stock and property connected therewith, to the said Dennis Egan, Commissioner of Lands and Immigration of the State of Florida on behalf of said State; reserving, however, to said James G. Gibbs, the right to institute against said Egan and his successors having possession of said road any legal proceedings for the determination of his claim to the possession of the railroad between Quincy and the Appalachicola River, and the delivery to said Egan of that portion of said railroad is subject to said right of the said Gibbs to institute such proceedings. And as to the railroad and property of the Florida Central Railroad Company, which the said receiver still holds in his possession for the purpose of recovering the balance due for moneys expended by him in the improvement thereof, it is ordered that the same be delivered to the said Florida Central Railroad Company, subject to the payment of said balance that may be now due after all proper allowances to the State of Florida.

It is further ordered, that the said receiver do close and settle up the business of his receivership with all convenient speed; that he collect all moneys due for freights, passage, mail service, and other services, and all dues of every kind which shall have accrued up to the time of his delivery of the possession as aforesaid, under his administration of said road and property; and that he settle his accounts for all receipts and expenses as receiver before the clerk of this court, who is hereby authorized to audit and settle the same under the direction of the *Chief Justice*; and that he exhibit his vouchers therefor. It is further ordered, that he have the use of all vouchers, reports and statements connected with the operations or business of the said railroad during his administration which he may require in the settlement of his accounts, and that he be authorized to retain permanent possession of all books, papers and accounts connected with his administration of the property during his receivership; giving access thereto, for the purpose of necessary information, to the officers of the State having the management of the said railroad.

It is further ordered and decreed, that out of the moneys in the hands of the receiver, or that may come to his hands, arising from the income, tolls and revenues of said railroad, or other sources connected therewith, over and above the charges and expenses paid, he pay the following charges, demands and amounts, in the order in which the same are here named; that is to say:

First. The costs and expenses of this suit, including the fees and costs of the officers of this court, and of any master or examiner appointed by the court to take accounts or testimony in the case, and the taxable costs and charges of the complainant.

Second. All expenses and debts due or incurred by the receiver, and all proper claims arising against him, in the administration of his trust as receiver, and not before paid or discharged, including stationery, clerk hire and traveling and other incidental expenses.

Third. A sum of money to be retained by the

receiver for his compensation as such, at the rate of of \$10,000 per annum, from the time of his assuming the duties of his appointment to the time of closing up the business incident thereto, including a reasonable time for the settlement of his accounts not later than the first day of July next.

Fourth. To the Rogers Locomotive and Machine Works the sum of \$15,800.84, and interest on the sum of \$10,707.81, at the rate of seven per cent. per annum, from the 24th day of August, 1874, till paid; being the amount due to said Company for locomotives received and used by said receiver, on which said Company had a specific lien.

Fifth. All unpaid sums due to laborers and servants actually employed in the operation and care of said railroad west of Lake City, during the pendency of this suit, and prior to the time when the said receiver took charge of said property (namely: from the 9th of December, 1873, to the 6th day of May, 1874); which sums, according to the report of said receiver, amount to \$12,000, or thereabouts.

Sixth. Any balance of moneys that may remain in the hands of said receiver after the payment of the said charges, demands and amounts, above specified, shall be paid by the receiver to the clerk of this court, who is hereby appointed register of the court to receive and keep the same subject to the further order of the court.

DECREE.

It appearing to the court that Robert Walker, the receiver in this cause, in pursuance of the order in that behalf, has filed quarterly reports of his transactions and accounts as such receiver, and of the condition and operations of the railroads and property in his charge, and ninth and last of which quarterly reports, for the quarter ending July 31, 1876, was filed on the 9th day of September last; and it appearing from said last quarterly report, that on the first day of June last he did deliver to Dennis Eagan, Commissioner of Lands and Immigration of the State of Florida, the said railroads and property, in pursuance of the decree made on the first day of May last; and it further appearing that the said receiver hath since filed four supplementary reports, containing further statements of his accounts and transactions, in relation to his said receivership, the thirteenth and final report being dated and filed on the 3d day of November last; and it further appearing from the said several reports that the total amount of money received by said receiver during his receivership was the sum of \$1,097,060.08; and that his disbursements, including the expenses of this suit and his salary as receiver, amounted to \$1,057,642.24, leaving in his hands a balance of \$39,417.84, including certificates of the Comptroller of Florida to the amount of \$2,808, given for transportation done for said State; which balance, in pursuance of said decree, he hath duly paid to the clerk of this court, appointed register to receive the same; and it also appearing from said reports, and also from the report of the said clerk, that said receiver has presented all his accounts and vouchers in relation to said receivership to the said clerk for examination and settlement; and that the same have been duly examined and audited and found to be correct, and no excep-

tions to said account having been filed, and no objections appearing thereto; now, on this 4th day of December, 1876, it is ordered, adjudged and decreed, that the said accounts and settlement be confirmed, and that the said receiver be discharged in respect to the same, and that he be also discharged from his said receivership.

And it further appearing that the said receiver has been allowed salary for his services only to the first day of July last, and that since that time he has been compelled to devote his constant labor and attention to the closing up and settlement of the said business, until the filing of his final report before mentioned, it is therefore further ordered and decreed, that said register do pay to him out of the moneys received as aforesaid, the further sum of \$2,500, as additional compensation for his services in this behalf.

And whereas, the said receiver, in his twelfth report filed on the 28th day of October last, states that a balance of \$270.68 is due from one Isaac R. Harris, his agent at Chattahoochee station, for which said agent presents (truly) as an excuse, that having no safe, and his office being insecure, his desk was broken open and robbed whilst he was temporarily absent attending to the duties of his agency; and no blame appearing to be attached to said agent, it is ordered that said receiver be discharged from prosecuting him and from further responsibility in the matter.

Per *Mr. Justice Bradley*.

Cited—108 U. S., 138; 8 Wood, 700.

CLERK'S ALLOWANCES.

At the next (1876) Term of the court the following opinions were delivered upon questions which arose in this case, and are fully stated by the court.

Mr. Justice Bradley delivered the opinion of the court:

A question arises in this case as to the proper allowance to the clerk for the custody of the money paid into court. It is suggested that, by the General Fee Bill (R. S., sec. 828), the clerks of the circuit courts receive one per cent. and that, by analogy, the same allowance would be proper in this case. The fees of the clerk of this court were prescribed by the Process Act of 1792, sec. 3, 1 Stat. at L., 276, which allowed the clerk \$10 per diem for attendance on the court; and for other services, double the fees of the Supreme Court of the State in which the court sat. This section was repeated in the Act of Feb. 28, 1799, 1 Stat. at L., 625, when the seat of Government was about to be removed to this District, and has never been altered. The bill of fees then adopted was based on those allowed by the laws of Maryland, to the clerk of the Court of Appeals of that State. At that time, 1800, the clerk of that court was allowed ten per cent. on fees paid into court, being a certain number of pounds of tobacco, which had formerly belonged to the chancellor, but were then directed to be paid into the State Treasury. 1 Kelly's Laws, 1779, CXXV., sec. XXIII. By the present Code of Maryland, a commission of five per cent. is allowed on taxes and license fees paid

into court. 1 Md. Code, 291. We find, however, no commissions specified for moneys paid into court generally, and presume that none are allowed. But by analogy to the fee bill, for the circuit and district courts, we think that one per cent. should be allowed in this case. This is the first instance known of moneys being paid into this court.

The allowance is made accordingly.

The following opinion was delivered and final decree entered in this cause December 11, 1876:

CREDITOR'S CLAIMS AGAINST RECEIVER.

Mr. Justice Bradley delivered the opinion of the court:

Application has been made to the court by various parties in this case for the balance of the fund which accrued from the operations of the railroad whilst in the hands of the receiver, and which is now in the registry of this court. This fund grew out of and was the immediate fruit of the property itself, and should be handed over to the same parties to whom this was properly deliverable. As we have decided that the property should be delivered to the complainant, the State of Florida, for the purpose of subserving the liens and trusts to which it is subject in the hands of the State, according to the disposition thereof to be made by the state courts in the principal litigation, we think that the fund on hand, after paying such sums as are properly chargeable thereon under our decree, should be disposed of in the same way. We are of opinion that the claim presented in behalf of Lyles & Gibson should, under the circumstances, be paid before the fund is paid over. Also, two small bills for supplies which were reported by the receiver as having come to his hands; and the additional costs that have been incurred, including one per cent. commission to the register.

A decree will be made accordingly.

DECREE.

Application being made in this case in behalf of a copartnership firm by the name of Lyles & Gibson, for the payment of a bill for supplies furnished for the railroads in charge of Robert Walker, the receiver, shortly before his appointment, and which supplies came to his hands and possession as such receiver, by the consent of Sherman Conant, to whom the said supplies had been consigned; and said bill having never been paid; and it seeming equitable and just, and the consent of the counsel for complainant, being given thereto, it is ordered that the register do pay said bill to said firm of Lyles & Gibson, or their attorney, amounting to the sum of \$1,595.95.

And whereas, the said receiver in his twelfth report states that, a few days before he took possession of said railroads, John C. Clark and S. B. Hubbard severally furnished to Jonathan C. Greely, former receiver, certain supplies which all or nearly all came into the hands of said Walker, receiver, and were used by him in repairs, said Clark's bill amounting to \$58.75, and said Hubbard's to \$66.96, and said bills

having never been paid; it is ordered that the register pay said bills to the said parties, or their attorneys respectively.

It is further ordered that the register do also pay such additional costs of the officers of this court as have been incurred since the decree made on the first day of May last, and not yet paid; and that he be authorized to retain one per cent. of all moneys received, for his commission upon the same.

It is further ordered that the balance of moneys in the registry of the court be paid by the register to the Treasurer of the State of Florida, to be disposed of according to the trusts that have been or may be declared of and concerning the same by the Supreme Court of Florida, or other court of said State having jurisdiction of the premises.

It is further ordered that the application of Daniel P. Holland for said balance and surplus be denied. *Per Mr. Justice BRADLEY.*

Apr. 28, 1877. It appearing to the court from the report of D. W. Middleton, the register appointed by this court in this cause, that he has, in pursuance of the decree of this court directing a distribution of the funds in his hands as such register, complied with said decree; it is now here ordered that said report be, and the same is hereby approved.

HORATIO N. SPENCER, *Appt.*,

v.
UNITED STATES.

(See S. C., 1 Otto, 577, 578.)

Abandoned and Captured Property Act, suits under.

No suit can be maintained against the United States under the Abandoned and Captured Property Act, if the property has neither been captured, seized nor sold pursuant to its provisions, and the proceeds are not in the Treasury.

[No. 168.]

Argued Mar. 15, 1876. Decided May 8, 1876.

APPEAL from the Court of Claims.

Messrs. George Taylor and Jos. Casey, for appellant.

Mr. Edwin B. Smith, Asst. Atty-Gen., for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

In this case, the Court of Claims has certified here, in answer to inquiries from us: (1) that the cotton in question did not come into the hands of any agent of the United States as abandoned or captured property, and was not sold as such; and (2) that the proceeds of the sale were not paid into the Treasury of the United States.

Upon this state of facts, the judgment of the court below was clearly right. It is certain that no suit can be maintained against the United States under the Abandoned and Captured Property Act, 12 Stat. at L., 820, if the property has neither been captured, seized nor sold pursuant to its provisions, and the proceeds are not in the Treasury.

The judgment of the Court of Claims is affirmed.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

OCTOBER TERM, 1875.

Vol. 92.

THE DECISIONS
OF THE
Supreme Court of the United States,
AT
OCTOBER TERM, 1875.

JOHN CAREY ET AL., *Appts.*,

v.

HENRY T. BROWN.

(See S. C., 2 Otto, 171-175.)

*Parties-trustees and cestuis que trust—objection,
when unavailing—fraud.*

1. The general rule is, that in suits respecting trust property brought either by or against the trustees, the *cestuis que trust* as well as the trustees are necessary parties.

2. But where the suit is brought by the trustee to recover the trust property or to reduce it to possession, and it in nowise affects his relation with his *cestuis que trust*, it is unnecessary to make the latter parties.

3. A formal objection of want of parties cannot avail the party making it, when made for the first time in this court.

4. One who prevents the discharge of a lien by his own fraud, cannot avail himself of it.

[No. 49.]

Argued Nov. 17, 18, 1875. Decided Dec. 6, 1875.

APPEAL in equity from the decree of the Circuit Court of the United States for the District of Louisiana.

This action was commenced in the court below by Henry T. Brown, the appellee, against James G. Parkerson, Ira Davis, A. L. Tucker and John Carey, residents of the Parish of St. Marys, Louisiana, and Thomas Hoskins, of Texas. The bill described a certain piece of real estate, asserted title thereto on the part of the plaintiff, and alleged that the defendants had fraudulently conspired to deprive him thereof. The nature of this conspiracy is set out in the opinion.

It appears that the defendant, Hoskins, at the succession sale of the property of one Oriel Howe, in 1856, purchased the land in question, situate in the Parish of St. Mary, for the consideration of \$19,000, of which \$1,000 was paid in cash, and for the remainder twenty-five promissory notes were given, with William Humphrey and James T. Grout as sureties, and secured by mortgage and vendor's privilege. These notes were made payable to the heirs of said Howe. Hoskins paid fourteen of these notes,

leaving eleven unpaid, and went to Texas, before October, 1868. In Sep., 1868, ten of the unpaid notes were placed in the hands of Brown & Wildes, of Athens, Ohio, for collection. Brown, of this firm, was the complainant herein. These attorneys supposed that the ten notes in their possession were the only ones unpaid. They opened correspondence with Tucker & Delahousse, a law firm in Louisiana, in regard thereto. Tucker, of this firm, was one of the defendants. After some negotiations, it was agreed between Hoskins, on the one part, and Brown on the other, through Tucker, Delahousse having retired from the firm, that Hoskins should transfer the property to Brown, for the *cestuis que trust*, and the notes given by him should be returned and canceled. It seems that Hoskins, also, as well as Brown, supposed that the ten notes in the possession of Brown were all that remained unpaid. Such a deed was actually executed, and is the basis of complainant's claim to title. The gist of the charge in the bill is, that the defendants, by means of a sale of the property in question on a judgment, confessed by Hoskins several years previously, upon the remaining unpaid note; and, also, by means of a deed from Hoskins and wife to the defendants, Parkerson and Davis, subsequent to the deed to Brown, had fraudulently conspired to obtain possession and title of the property. The court below rendered a decree for the complainant.

The case further appears in the opinion.

Messrs. Conway Robinson, Finney & Miller, for appellants.

Messrs. Charles Townsend, Durant & Horner, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

The appellants were defendants in the court below. Tucker and Hoskins, the other defendants, declined to appeal.

The case was ably argued here by the counsel upon both sides.

It is insisted that the bill is fatally defective for want of parties. It alleges that the complainant was the owner and holder of the ten promissory notes which lie at the foundation of the case. In his testimony, he says he held the legal title to them, and that they were de-

NOTE.—Necessary parties in equity; objection, when to be made. See note to *Morgan v. Morgan*, 15 U. S. 678, 10 Otto, 300.

See, also, 2 Otto, 171.

livered to him by their respective owners, with power to settle and dispose of them at his discretion, and with no condition imposed but the implied one that he should account for the proceeds to those from whom he received them.

The transfer created a trust. Those who transferred them were the *cestuis que trust*, and Brown was the trustee.

The general rule is, that in suits respecting trust property, brought either by or against the trustees, the *cestuis que trust* as well as the trustees are necessary parties. Story, Eq. Pl., sec. 207. To this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust property or to reduce it to possession, and in no wise affects his relation with his *cestuis que trust*, it is unnecessary to make the latter parties. *Horsley v. Fawcett*, 11 Beav., 569, was a case of this kind. The objection taken here was taken there. The Master of the Rolls said, "If the object of the bill were to recover the fund with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust moneys, so as to enable the trustee hereafter to distribute them agreeably to the trusts declared. It is, therefore, unnecessary to bring before the court the parties beneficially interested." Such is now the settled rule of equity pleading and practice. *Adams v. Bradley*, 12 Mich., 846; *Ashton v. Bk.*, 3 Allen, 217; *Boyden v. Partridge*, 2 Gray, 191; *Swift v. Stebbins*, 4 Stew. & P., 447; *Association, etc., v. Beekman*, 21 Barb., 565; *Alexander v. Cana*, 1 DeG. & Sm. Ch., 415; *Potts v. Thames H. D. & R. Co.*, 7 Eng. L. & E., 262; *Story v. Livingston*, 18 Pet., 859. Where the want of parties appears on the face of the bill, the objection may be taken by demurrer. Where it does not so appear, it must be made by plea or answer. Here the defect, if there was one, did not appear in the bill, and no plea or answer setting it up was filed in the circuit court. It was first made here. A formal objection of this kind cannot avail the party making it, when made for the first time in this court. *Story v. Livingston, supra*.

It is said that Hoskins prescribed a condition precedent; and that Brown, not having complied with it, never acquired any right or title to the property in controversy. We had occasion to consider this head of the law in *Davis v. Gray*, 16 Wall., 230 [83 U. S., XXI., 456].

Hoskins executed a deed to Brown, and forwarded it to Parkerson, to be held by him until all the notes of Hoskins given for the purchase money, still outstanding, were canceled and delivered to Parkerson. Parkerson was the recorder of the parish where the land was situated. Brown then held ten of the notes. He and Hoskins believed they were all. Upon being advised by Tucker of the deposit of the deed, Brown wrote to have a copy of it forwarded to him for examination, and inquired, as he had done several times before, whether Hoskins had in any way incumbered the property. Parkerson thereupon sent him a copy of the deed, with a certificate, signed himself as recorder, setting forth, that, upon examining the records in his office, he found that "Said Hoskins has not subjected said property to any mortgage except as forfeited taxes to the State."

There was an eleventh note, upon which, several years before, a judgment had been rendered in favor of Mrs. Knight. The judgment had been so inscribed in the office of Parkerson that, under the law of Louisiana, it became a mortgage upon the premises. The certificate was false, and Parkerson knew it. It cannot be doubted that Tucker knew these facts also. The inscription was, as it had been, concealed from Brown. This was the beginning of the web of fraud woven by the confederates. Brown, being satisfied with the deed, transmitted the ten notes to Parkerson, with directions to cancel them, to record the deed, and to send it to him by mail. Instead of doing as directed, Parkerson handed over the letter and notes to Tucker, withheld the deed from record, and retained possession of it. Subsequently, Davis, the law partner of Tucker, visited Hoskins in Texas, where he lived, delivered up his deed to Brown, and procured from him a quitclaim deed for the same property to Parkerson and himself, for the consideration of \$250. Later, they gave Hoskins, voluntarily, a guaranty against his liability upon all the outstanding notes. They conveyed the premises to Carey, a brother-in-law of Parkerson. Carey claims to have been a *bona fide* purchaser, without any notice of the rights of Brown. In order to strengthen his title, he took measures to have the premises sold under the judgment in favor of Mrs. Knight. Upon learning the existence of the judgment, Brown offered twice to furnish to Carey the means to discharge it. The money was refused. The property was sold under the judgment and bought in by Carey. He paid the judgment and the costs. The balance of his bid, upon which the property was struck off to him by the sheriff, remained in his hands unpaid, and unaccounted for to anyone. Public notice was given at the sale of the claim of Brown. Thereafter Carey claimed to hold under the sale, as well as under the deed from Parkerson and Davis.

It is not denied that Parkerson and Davis had full knowledge of all the facts touching the conveyance by Hoskins to Brown when they received the deed from Hoskins to them; and the evidence, both direct and circumstantial, is plenary to show that Carey, before Davis and Parkerson conveyed to him, was equally well advised. It is impossible to resist the conviction that there was a deliberate scheme; that all the appellants and Tucker were parties to it, and that every act of each of the confederates touching the property, after the deposit of the deed to Brown with Parkerson, was done to give effect to the purpose of the conspiracy.

In the presence of these facts, the doctrine of conditions precedent can have no application. Sterner principles intervene, and become factors in the determination of the case.

The court decreed that the deed of Hoskins to Brown was, as against the subsequent deed of Hoskins to Parkerson and Davis, a valid subsisting title; that the deed of Parkerson and Davis to Carey was void, and of no effect; that the ten notes should be delivered up by Tucker, and canceled; that Brown should pay to Carey the amount Carey had paid in satisfaction of the judgment; that, upon such payment being made, Carey should convey the property to Brown as trustee for those whom Brown represented in the litigation; and that the decree should be

without prejudice to Brown's claims for *mesne* profits, and to Tucker's claim against Brown for professional services.

It is said the decree is erroneous because it did not ascertain the amount proper to be allowed to Tucker, and order its payment.

It was not proper to deal with that subject in this suit. Tucker had no lien either upon the notes or the land. Not having appealed from the decree below, he cannot object to it here.

It is said, also, that the decree is erroneous as to the effect of the deed from Hoskins to Brown. Upon the delivery of the ten notes to Parkerson, the deed became effectual. He should have canceled the notes, and put the deed on record.

The lien of the judgment was ample for the security and indemnity of Hoskins. Brown would have taken the title subject to the incumbrance. The light thrown backward by the subsequent events shows that he would have been ready and willing to satisfy the judgment whenever its existence was made known to him.

He was prevented from discharging the lien by the fraud of those who now seek to avail themselves of it. This they cannot be permitted to do.

It is insisted that the decree does injustice to Carey. It gave him all he was entitled to. He acquired whatever title he had *ex maleficio*, and held it as a trustee *in invitum* for Brown and his *cestuis que trust*. *Monger v. Shirley*, not yet reported [XXII., 449].

A case of clearer equity on one side, and of iniquity on the other, is rarely presented for the consideration of a court of justice.

The decree of the Circuit Court is affirmed.

HENRY M. NEBLETT, *Appt.*,

v.

JAMES E. MACFARLAND.

(See S. C., 2 Otto, 101-105.)

Decree in action to set aside deed—restoration of consideration.

1. Where an action was brought to set aside a conveyance, and the only consideration given for the conveyance was the cancellation of a certain bond, and the court below directed the execution of a deed reconveying the property and ordered the re-

turn and redelivery of the bond, and that it and the mortgage made for its security, should retain the same lien and have the same force and effect as if the deed had not been made, or any cancellation of the bond taken place, the court should not, instead of directing a return of the bond, have directed the payment of the amount of money secured thereby, although there was a defense to the bond arising from the Statute of Limitation.

2. It is no objection to the restoration of property received on a fraudulent sale, that it has fallen in value since the date of the transaction; nor if the property is of a perishable nature, is the holder bound to keep it in a state of preservation until the bill is filed.

[No. 80.]

Submitted Dec. 13, 1875. Decided Jan. 10, 1876.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This was an action brought in the court below, by Macfarland, the appellee, for the purpose of having a certain deed, made by him, canceled. The case is stated in the opinion.

Messrs. W. Alex. Gordon and Thos. J. Semmes, for appellant.

Messrs. Jno. A. Campbell, E. M. Hudson and Walker Fearn, for appellee.

Mr. Justice Hunt delivered the opinion of the court:

The allegation of error in this case is confined to a single point. In his brief, the counsel for the appellant says: "The court erred in not making the payment of our bond a condition precedent to the reconveyance of the plantation, as set forth in our motion for a new trial; and on this ground, and from this point of the decree, do we appeal and ask for relief."

The action was brought to set aside the conveyance of a plantation in Louisiana, made by Macfarland to the appellant, Neblett, upon the allegation that the conveyance was obtained by the fraudulent acts and representations of Neblett and his father.

The only consideration given, or professed to be given, by Neblett for the conveyance was the cancellation of a certain bond for the sum of \$14,464.51, executed by Macfarland to Sterling Neblett, the father, and alleged to be the property of Henry Neblett.

The court below adjudged the transaction to be fraudulent, directed the execution of a deed reconveying the property, and ordered the return and redelivery of the bond for \$14,464.51, unaffected by any indorsement of credit or pay-

NOTE.—When deeds are void for fraud, insanity, drunkenness, duress, undue influence, imbecility, infancy, or fraud of husband, from ward to guardian, from *cestui que trust* to trustee, from heir to executor. See note to *Harding v. Handy*, 24 U. S. (11 Wheat.), 108.

Cancellation of a deed or a contract in equity for fraud, concealment or misrepresentation.

Courts of equity have undoubted jurisdiction to compel the surrender and cancellation of deeds obtained by fraud or held for inequitable and unconscientious purposes. *Walker v. Hunter*, 27 Ga., 336; *Hayward v. Dinsdale*, 17 Ves., 111; *Hamilton v. Cummings*, 1 Johns. Ch., 517; *Van Doren v. Mayor*, etc., 9 Paige, 388; *Fonda v. Sage*, 48 N. Y., 187; *McHenry v. Hazard*, 45 N. Y., 580; *Whittingham v. Thornburgh*, 2 Vern., 206; *De Costa v. Scandrel*, 2 P. Wms., 170; *Peake v. Highfield*, 1 Russ., 559.

Suppression by husband, that his wife was under age at the time of execution, is sufficient ground for setting deed aside. *Bryan v. Primm*, 1 Ill., 33.

Deed void on its face for want of acknowledgment, required of married women, will not be set aside for that reason. *Elliott v. Peirsoil*, 1 McLean, 11.

False representations to wife at time of procurement. See 2 Otto.

ing her acknowledgment to a deed, is sufficient ground for setting it aside. *Jewett v. Linberger*, 3 Pittsb., 157.

Equity generally will not compel surrender of a deed as void where the defect is apparent on its face and extrinsic evidence is not required to prove it. *Peirsoil v. Elliott*, 31 U. S. (6 Pet.), 95; *Gray v. Coan*, 23 Iowa, 344; *Ward v. Dewey*, 16 N. Y., 519; *Simpson v. Ld. Howden*, 3 My. & C., 97.

Equity will order a deed to be delivered to the grantor for the purpose of canceling a clause of general warranty fraudulently inserted after delivery by the grantee, although the deed conveyed no title to the grantee. *Maise v. Garner*, 1 Mart. & Y., 383; S. C., 17 Am. Dec., 817.

Equity has power to order the cancellation of a void deed. The deed may be a cloud on the title. *Jones v. Perry*, 10 Yerg., 59; S. C., 30 Am. Dec., 430; *Johnson v. Cooper*, 2 Yerg., 524; *Sherman v. Fitch*, 98 Mass., 59; *Bromley v. Holland*, Coop., 9.

A court of equity may rescind a conveyance of land or a contract therefor which has been procured by fraud or false representations, when a proper case is presented. *Smith v. Robertson*, 23 Ala., 312; *Stark v. Henderson*, 30 Ala., 438; *Evans v. Bicknell*, 6 Ves., 174; *Woodman v. Freeman*, 25

ment thereon, and, the same, with the mortgage made for its security, to retain the same lien thereon and the same force and effect as if the deed had not been made, or any cancellation of the bond taken place.

The complaint now made is, that, instead of directing a return of the bond *in specie* as a condition for the return of the land, the court should have directed the payment of the amount of money secured thereby.

In cases of this character the general principle is, that he who seeks equity must do equity; that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction. *Bellamy v. Sabins*, 2 Phil., 425; *Savery v. King*, 5 H. L. Cas., 627; *W. Bk. of Scotland v. Addie*, L. R., 1 Scotch App. Cas., 162; *Gatling v. Newell*, 9 Ind., 572; *Johnson v. Jones*, 18 Smedes & M., 580; *Kerr*, Fraud, 335, 343. This is, no doubt, the general rule.

We do not, however, perceive that the principle will benefit the complaining party in this suit.

1. He is restored here to his property that he had and parted with when he received his deed, to wit: his bond and mortgage. If he had paid \$14,500 in money, and received in return only a bond for the like amount, of doubtful security and impaired by the lapse of time, he might well have complained. But he paid no money. He surrendered a bond against an insolvent debtor who had left the country, and a mortgage upon an estate abandoned by the owner, and in relation to which the Nebletts, father and son, make the most bitter complaints of its insufficient security.

In his letter of Sep. 29, 1869, Henry Neblett says: "Your deed lay in the hands of your uncle as an escrow. * * * I have hesitated whether to abandon the place, or struggle to save something by borrowing a large sum, and risk of forced culture in latitude 30 $\frac{1}{2}$." Sterling Neblett, the father, writes: "If Mendoza be correct, as he just advised, that there are numerous debts and some judgments against Mossland"

(the plantation in question), "liens on the property that Henry nor I did not know of, the trust-deed on record at St. Martin's give the only protection against them. * * * Henry is absent, and has long been the true owner of James Edward's bond. I thought of you if interested and my deed to Henry could arrange matters. But alas! so far unsuccessful—debts to others, less and less probability of buying the Bruossade bonds. * * * How much money will you provide Henry if he decides to go?"

The letter of the same person, of February, 1869, is filled with the accounts of the embarrassments and difficulties, of the depreciation of the estate, the claims for taxes, judgments and general creditors. Among other things, he says, "I know Henry would let you have his debt" (the bond in question) "for fifty cents on the dollar."

We are not able to say, nor is it very material to know, whether these statements were false and fraudulent, or whether the security was really so inadequate as is here represented. Whether good or bad, he receives now the same security that he then gave to his vendor. It would be a perversion of justice to give him the full amount in money for a security then worth but fifty cents on the dollar. If, on the other hand, it was then an adequate security, it is the same now.

2. It is no objection to a restoration of property received on a fraudulent sale that it has fallen in value since the date of the transaction. *Blake v. Mowatt*, 21 Beav., 613; *Veazie v. Williams*, 8 How., 134, 158. Nor, if the property is of a perishable nature, is the holder bound to keep it in a state of preservation until the bill is filed. *Scott v. Perrin*, 4 Bibb, 360; *Kerr*, 337.

A party seeking to set aside a sale of shares is not bound to pay calls on them, to prevent forfeiture after filing his bill; nor is it fatal to his right of rescission that some of the shares have been thus perfected.

We have no means of knowing whether there can be a defense made to the bond arising from the Statute of Limitations. It would seem that when the bond has been so recently adjudged by the court to be a subsisting security, and to be a lien upon the plantation directed to be re-

Me., 531; *Hickey v. Drake*, 47 Mo., 309; *Green v. Chandler*, 25 Tex., 148; *Griffin v. Sketoe*, 30 Ga., 300.

A party who would rescind a contract on the ground of fraud, must offer to do so in a reasonable time after the fraud is discovered. *Davis v. Tarwater*, 15 Ark., 286; *Myers v. O'Hanlan*, 12 Rich., 196; *Foster v. Gressett*, 29 Ala., 393; *Obert v. Obert*, 12 N. J. Eq., 423; *Walsham v. Stalton*, 1 De Gex, J. & S., 678.

A contract or conveyance will not, in general, be set aside for fraud except at the option of the party defrauded. *Jones v. Hill*, 9 Bush., 692; *Ayers v. Hewett*, 19 Me., 281.

The proof of the fraud must be full, clear and explicit. *Rupart v. Dunn*, 1 Rich., 101.

Fraudulent representation and concealment by the vendor as to the nature, quality and quantity of land, will entitle the vendee to a rescission of the contract. *Thomas v. Beebe*, 25 N. Y., 244; *Martin v. Jordan*, 60 Me., 531; *Perkins v. Rice*, 6 Litt., 218; *Camp v. Camp*, 2 Ala., 632; *Smith v. Robertson*, 23 Ala., 312; *Mitchell v. Moore*, 24 Iowa, 394; *Underwood v. West*, 43 Ill., 403; *Parrett v. Schaubhut*, 5 Minn., 323.

The equity of a bill to rescind a contract on the ground of fraud is weakened by delay in bringing the suit. *Foxworth v. Bullock*, 44 Miss., 457.

False representations or concealment by the vendor, as to his title, will entitle to a rescission of the contract. *Gray v. Bartlett*, 20 Pick., 186; *Crutchfield v. Danilly*, 16 Ga., 432; *Gill v. Corbin*, 4 J. J. Marsh., 392; *Green v. Chandler*, 25 Tex., 146; *Smith v. Robertson*, 23 Ala., 312; *Prout v. Roberts*, 32 Ala., 427; *Carr v. Callaghan*, 3 Litt., 365; *Kennedy v. Johnson*, 2 Bibb, 12.

The misrepresentation, to avoid a contract of sale, must be of some material fact and falsely and fraudulently made. *Pratt v. Philbrook*, 33 Me., 17; *Brown v. Blunt*, 72 Me., 415; *Wilson v. Strayhorn*, 26 Ark., 28.

If the vendee, with full knowledge that he has been defrauded, proceeds to execute the contract by payments of parts of the purchase money, it is a waiver of the fraud. *Knuckolls v. Lea*, 10 Humph., 577.

It is always competent to show fraud and misrepresentation by parol evidence. *Rogers v. Hadley*, 2 Hurl. & C., 227; *Robinson v. Ld. Vernon*, 7 C. B., N. S., 231; *Hatson v. Browne*, 9 C. B., N. S., 442; *Chambers v. Livermore*, 15 Mich., 381; *Phyfe v. Wardell*, 2 Edw. Ch., 47; *Best v. Stow*, 3 Sandf. Ch., 300.

conveyed—the party in substance redelivering the bond as a condition of obtaining such conveyance, that a defense of this character could not be a good one. But, of this the appellant must take his chance. If the bond has become thus impaired, it is no worse than the loss of a perishable article or the forfeiture of shares during the litigation. These circumstances do not alter the rule of law. In *Gatling v. Newell*, *supra*, it is said, “The party defendant is not bound to rescind until the lapse of a reasonable time after discovering the fraud. Hence the parties cannot be placed *in statu quo* as to time.”

Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. If they are caught in their own toils, and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty.

The judgment was right and must be affirmed.

RICHARD L. WALLACH ET AL., *Appts.*,
v.

JOHN VAN RISWICK.

(See S. C., 2 Otto, 202-214.)

*Confiscation Act—effect of sale under—heirs—
Amnesty Proclamation.*

1. After an adjudicated forfeiture and sale of an enemy's land under the Confiscation Act of Congress, of July 17, 1862, and the Joint Resolution of even date therewith, there is not left in him any interest which he can convey by deed.

2. The Joint Resolution was intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death.

3. The Proclamations of amnesty after the close of the war, could not give back the property which had been sold, nor any interest in it, either in possession or expectancy.

[No. 62.]

Argued Dec. 2, 3, 1875. Decided Jan. 10, 1876.

APPEAL from the Supreme Court of the District of Columbia.

This was a bill in equity filed in the court below by the appellants. The defendant demurred. The equity judge sustained the demurrer and dismissed the bill. On appeal, the General Term affirmed that decree, and the complainants appealed to this court.

The case is fully stated by the court.

Messrs. Pike & Johnson and *Luther H. Pike*, for appellants:

The conveyance by Wallach to Van Riswick was idle and ineffectual, because by the seizure and condemnation, all the estate, property, right and interest of Wallach passed to and vested in the United States, it covenanting that the effects of this should end with his death.

When, in England, by an act of attainder, forfeiture of land of a traitor was pronounced, the Crown took the property by right of that reversion, as the lord originally did on tenant's death or failure to perform services.

The whole estate of the offender, the whole property in the land, vested in the Crown by the forfeiture. *Brown v. Waite*, 2 Mod., 180.

The Act in question by itself, re-enacted the

See 2 Otto.

U. S., Book 23.

old English law. It took the whole estate and property, to the exclusion of the heirs.

The Joint Resolution did not intend or propose to do more than to apply the constitutional saving.

The words “during the life of the person attainted,” never meant that only an estate for his life was forfeited, leaving in him a reversion in fee, disposable presently by him by feoffment or grant.

If it were necessary, to give effect to the Act and Joint Resolution of Congress, under which the land was seized and condemned, the court would consider the forfeiture equivalent, by virtue of the law, to a conveyance by Wallach to the United States, to its use during his life, and to that of his heirs after his death.

The Joint Resolution is virtually a covenant to stand seised to uses.

If the King made a gift in tail, and the donee was attainted of treason, the King was in point of reverter, and the fee simple determinable on the dying without issue united in him with this, giving him the whole, and avoiding leases by tenant in tail.

Co. Inst., i. 504, a; *Queen v. Hussey*, Cro. Eliz., 519; *Sheffield v. Ratcliffe*, Hob., 834 a; S. C., W. Jones, 69; *Lord Lovell's case* (*Nichols v. Nichols*), Plowd., 477; *Walsingham's case*, Plowd., 552, 561; *Brown v. Waite*, 2 Mod., 180; Harper, J., in *Lord Lovell's case* (*supra*), 487; *Brown v. Waite*, 2 Mod., 183.

By the Act of Congress, the seizure and condemnation vested the whole estate and property of Wallach in the land, in the United States. And as, under an Act of Attainder, with a saving in favor of all others than the attainted party and his heirs. “The saving removed the fee simple out of the person of the King, and conveyed it to the third person whose right was saved, so that he could have it by means of the saving; for it was in the King when the condition was performed, and it must go out of him to the person, by the condition and by the saving; so the whole fee was vested in the United States, and at the death of Wallach, was removed out of the United States, by the condition and saving in the Joint Resolution, and was thereby conveyed to his heirs. *Lord Lovell's case* (*supra*), 488, 489.

The Joint Resolution of Congress had for its purpose, exclusively, to rescue innocent heirs from the consequences of their father's or ancestor's acts.

See, 2 History and proceedings of House of Lords, 261, ff; Stat. 5 Eliz., ch. 11; Stat. 18 Eliz., 1; Fost. Crown L., 222.

When the right of an heir is saved by an Act, he shall take by descent, although the estate never vested in his ancestor. It is no new case that an estate shall cease for a time, by virtue of an Act of Parliament and afterwards revive. Judges ought not to construe the limitation of An Act of Parliament made for a particular purpose by the strict rules of law; for Parliament can control the rules of law.

Thornby v. Fleetwood, 1 Com., 207; S. C., Str., 818; *Lord de la Warre's case*, 11 Co., 1 b; *Earl of Derby's case*, 1 Ld. Raym., 355.

It would be equally dangerous and inconvenient to the public, in such a case, to permit the offender to enjoy any estate in the land; and this was the controlling motive with the

Legislature. The principal purpose was to take the land wholly away from him. The Act of Congress provided for that. The proviso did not mean to interfere with that; but by way of grace, to give back the land to his heirs at his death.

See, *Wheatly v. Thomas*, 1 Ley., 74; *Sheffield v. Ratcliffe*, Hob., 335 a; *Burgess v. Wheate*, Eden., 177.

There is no case to be found in the books, of a reversion to a party after an estate to another for the life of the former. Washb. Real Prop. ii., 685, 688, 891, 892, 895; Williams, 222.

There is nothing whatever in the objection that no one can be heir of a person living, and that if the whole right of the owner of the land was forfeited and taken by the State, there could be no inheritance by children, nor could they take the land as his heirs. *Sheffield v. Ratcliffe*, Hob., 334 a.

The heir is often a mere *descriptio personæ*, or sufficient designation of the person for a remainder to vest, notwithstanding the rule, *Nemo est*, etc. Fearn, Rem., 210; *Darbishon v. Beaumont*, 1 P. Wms., 229; *Brooking v. White*, 2 W. Bl., 1010; *Sheffield v. Ratcliffe*, Hob., 337 a.

As the constitutional provision and the Act and Joint Resolution are to be read together, as if they were one enactment, they equally forbid disinheriting the heirs, and give them the right of entry at his death. For the object of our Constitution and laws, like that of the English Statutes, is to save the offender's estate to his innocent heirs.

Such was the declared purpose of the English Acts.

Chandler, Journ. of Parl., Ho. of Com., XVIII., 193, 195, 204; Hansard, Parl. Deb., VI., 796; Aikman, Hist. of Scotland, V., 571; Burnet, Hist. of his own time, ii., 837, 838; Macaulay, Hist. of Eng., iii., 241, 242; Hansard, Parl. Deb., XIII., 706, ff. 791, ff. 825, 855, 872 and 8, 888.

Civil death is the total deprivation of civil rights.

Marcadae, Explic. 1, 141, 120, 122, 125, 127; Domat. Prel. Book, tit. ii., sec. ii., XII., 108; Pand. XLVIII., 19, 17, sec. 1; *Id.* 19, 29; Institutes, lib. 1, tit. XII.

If there could have been, in Charles S. Wallach, a reversion in fee, expectant on an estate for his own life in the United States, it would have been a forfeitable estate.

The Lord Advocate v. Gordon of Park, 1 Craig. S. & P., 508, 567; Morrison, Decis. of Court of Sess., XI., 4728; Lord Kairn's Elucidations, 871, cited in *The Earl of Perth v. Lord Elphinstone*, L. R. 2 H. of L., Scotch & Div. App., 189.

Messrs. T. A. Lambert and Durant & Horner, for defendant in error:

The appellee, Van Riswick, contends that the proceedings in forfeiture, under these U. S. Statutes, carved out of the fee in Wallach a life estate, and left in Wallach a fee-simple, in reversion.

Nothing prevented Wallach from selling his reversionary fee, as it existed after the forfeiture and subject to the life estate, to any person having the usual capacity to act, who was neither a citizen nor an enemy of the United States.

La Plante's case, 6 Ct. Cl., 811; *Clay's case*,

cited 3 Law Reg., N. S., 368; *Corbett v. Nutt*, 10 Wall., 464 (77 U. S., XIX., 976).

If we admit, *e. g.*, that the action of the United States in forfeiting the life estate of Wallach was equivalent to the grant by Wallach of his life estate to the United States, yet it does not follow that to such an estate there is no reversion to Wallach, but only a reversion to his heirs, for this would be for courts of equity to interfere to exaggerate forfeitures or penalties.

Story, Eq., sec. 1326.

Both parties contend that a reversion exists after the United States has obtained the life estate. The appellants claim that the forfeiture of the enemy's life estate is perfect until his death; and up to that time the law preserves the reversion for his heirs. Hence, they say, the sale of the reversion by the enemy during his lifetime is absolutely void.

This is clearly another of the very many false applications of the doctrine of absolute nullity.

It is true the statute, 12 Stat. at L., 589, first confiscates the fee; but the amendment, p. 627, provides that it shall be so construed as to work no forfeiture of the offender's real estate beyond his natural life. Admit Wallach to be an offender, *e. g.*, then the plain answer to the appellants is, "All that the United States forfeited, it sold."

It having been, then, solemnly determined that "All that the United States forfeited, it sold," and that this was rigorously the life estate of the enemy in his right, title and interest in the property and no more, and whatever this might be; and that the resolution of Congress, suggested by the President, 12 Stat. at L., 627, should be read as if embodied in the original Act, 12 Stat. at L. 589, it follows that the heirs of the enemy can have no rights whatever under this legislation, and were not even thought of when the Act and its amendment were passed.

Day v. Micou, 18 Wall., 156 (85 U. S., XXI., 860).

How can such a result as an entire incapacity to act be made to flow from a decree of forfeiture of property in a procedure *in rem*? This decree had not the slightest relation to the punishment of the offender, but to the extinguishment of the rebellion. It was strictly *in rem*. It could not, by possibility, operate upon Wallach's capacity to act.

Wallach was never dead *civiliter* until dead *naturaliter*, and his death was a long time after the date of the deed complained of. The laws relating to civil death were never pushed to such extremes. "Civil death has nothing to do with confiscation." 2 Savigny, 152.

Assuming that Charles S. Wallach was incapable of deriving benefit from the President's Proclamation of Amnesty of May 29, 1865, either by reason of his failure to take the oath thereby prescribed, or of his being included among the excepted classes therein enumerated, it is not to be denied that he was fully pardoned by the subsequent Proclamation of Dec 25, 1868. The amnesty then declared was unconditional and ample. Under its benign operation Charles S. Wallach, in common with all other grantees in pardon, was completely restored to the enjoyment of his property, as well as personal rights, however those rights may have been suspended by the rebellion.

Ex parte Garland, 4 Wall., 383 (71 U. S., XVIII., 386); *Armstrong's Foundry*, 6 Wall., 766 (73 U. S., XVIII., 882); *Brown v. U. S.*, McCahon, 230.

Admitting, then, that Wallach, at the time he executed the deed of Feb. 3, 1866, was without title to the property sought to be conveyed, and that, Dec. 25, 1868, he was re-invested with the title by operation of amnesty, can it be doubted that he in his lifetime was estopped, and that his heirs after him are estopped from denying the validity of that conveyance?

To do so would be to impeach one of the best established principles of equity jurisprudence.

McWilliams v. Nisley, 2 S. & R., 507, 518; Smith, L. C., 5th Am. ed., 641, 651.

Mr. Justice Strong delivered the opinion of the court:

The complainants are children and heirs at law of Charles S. Wallach, who was an officer in the Confederate army during the late rebellion. While he was thus in that service, his real estate situate in the City of Washington was, by order of the President, seized under the Confiscation Act of July 17, 1862, and a libel for its condemnation duly filed. The lot of ground, respecting which the present controversy exists, was condemned as forfeited to the United States on the 29th day of July, 1863; and, on the 9th day of September next following, it was sold under a writ of *venditioni exponas*, the defendant Van Riswick becoming the purchaser. Prior to the seizure, the lot had been conveyed by Charles S. Wallach in trust to secure the payment of a promissory note for \$5,000 which he had borrowed; and, at the time of the seizure, a portion of this debt remained unpaid and due to the defendant, to whom the note and the security of the deed of trust had been assigned. Wallach's interest in the property was, therefore, an equity of redemption; and, by the confiscation sale, the purchaser acquired that interest, and held it with the security of the deed of trust given to protect the payment of the promissory note. On the 8d of February, 1866, Wallach, having returned to Washington, made a deed purporting to convey the lot in fee simple with covenants of general warranty to Van Riswick, the purchaser at the confiscation sale. His wife joined with him in the deed.

So the case stood until Feb. 3, 1872, when Wallach died. The complainants then filed this bill, claiming, that after the seizure, condemnation and sale of the land, as the property of a public enemy engaged in the war of the rebellion, nothing remained in him that could be the subject of sale or conveyance; consequently, that nothing passed by the deed from Wallach and wife; and that they, being his heirs, had, upon his death, an estate in the land, and a right to redeem, and to have the conveyance of their father to Van Riswick declared to be no bar to their redemption. The relief sought is redemption of the deed of trust, discovery (particularly of the amount remaining due upon Charles S. Wallach's note), an account of the rents and profits of the lands since the death of Wallach, a decree that his deed of Feb. 3, 1867, is of no effect as against the plaintiffs, a decree for de

livery of possession of the lot, and general relief.

To this bill the defendant Van Riswick demurred generally; and the court below sustained the demurrer and dismissed the bill. Hence this appeal.

The formal objections to the bill deserve but a passing notice. It is not, we think, multifarious; and all persons are made parties to it who can be concluded or affected by any decree that may be made; all persons who have an interest in the subject-matter of the controversy. The main question raised by the demurrer, and that which has been principally argued, is, whether, after an adjudicated forfeiture and sale of an enemy's land under the Confiscation Act of Congress of July 17, 1862, 12 Stat. at L., 589, and the Joint Resolution of even date therewith, there is left in him any interest which he can convey by deed.

The Act of July 17, 1862, is an Act for the confiscation of enemies' property. Its purpose, as well as its justification, was to strengthen the government, and to enfeeble the public enemy by taking from the adherents of that enemy the power to use their property in aid of the hostile cause. *Miller v. U. S.*, 11 Wall., 268 [78 U. S., XX., 185]. With such a purpose, it is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein, which he might sell, and with the proceeds of which he might aid in carrying on the war against the government. The statute indicates no such intention. The contrary is plainly manifested. The 5th section enacted that it should be the duty of the President of the United States to cause the seizure of "all the estate and property, money, stocks, credits and effects," of the persons thereafter described, of whom Charles S. Wallach was one, and to apply the same and the proceeds thereof to the support of the army of the United States; and it declared that all sales, transfers and conveyances of any such property should be null and void. The description of property thus made liable to seizure is as broad as possible. It covers the estate of the owner; all his estate or ownership. No authority is given to seize less than the whole. The 7th section of the Act enacted that, to secure the condemnation and sale of any such property, viz.: the property seized, so that it might be made available for the purpose aforesaid, proceedings should be instituted in a court of the United States; and if said property should be found to have belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, the same should be condemned as enemies' property, and become the property of the United States, and might be disposed as the court should decree, the proceeds thereof to be paid into the Treasury of the United States for the purpose aforesaid. Nothing can be plainer than that the condemnation and sale of the identical property seized were intended by Congress; and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the Act. If, therefore, the question before us were to be answered in view of the proper construction of the Act of July 17, 1862, alone, there could be no doubt that the seizure,

condemnation and sale of Charles S. Wallach's estate in the lot in controversy left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another. This we understand to be substantially conceded on behalf of the defendant.

But the Act of 1862 is not to be construed exclusively by itself. Contemporaneously with its approval, a Joint Resolution was passed by Congress, and approved, explanatory of some of its provisions, and declaring that "No proceedings under said Act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." The Act and the Joint Resolution are, doubtless, to be construed as one Act, precisely as if the latter had been introduced into the former as a proviso. The reasons that induced the passage of the Resolution are well known. It was doubted by some, even in high places, whether Congress had power to enact that any forfeiture of the land of a rebel should extend or operate beyond his life. The doubt was founded on the provision of the Constitution, in section 3, article 3, that "No attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." It was not doubted that Congress might provide for forfeitures effective during the life of an offender. The doubt related to the possible duration of a forfeiture, not to the thing forfeited, or to the extent and efficacy of the forfeiture while it continued. It was to meet the doubt which did exist that the resolution was adopted. What, then, is its effect? and what was intended by it? Plainly it should be so construed as to leave it in accord with the general and leading purpose of the Act of which it is substantially a part; for its object was, not to defeat, but to qualify. That purpose, as we have said, was to take away from an adherent of a public enemy his property, and thus deprive him of the means by which he could aid that enemy. But that purpose was thwarted, partially at least, by the Resolution, if it meant to leave a portion, and often much the larger portion, of the estate still vested in the enemy's adherent. If, notwithstanding an adjudicated forfeiture of his land and a sale thereof, he was still seised of an estate expectant on the determination of a life estate which he could sell and convey, his power to aid the public enemy thereby remained. It cannot be said that such was the intention of Congress. The residue, if there was any, was equally subject to seizure, condemnation and sale with the particular estate that preceded it. It is to be observed that the Joint Resolution made no attempt to divide the estate confiscated into one for life, and another in fee. It did not say that the forfeiture shall be of a life estate only, or of the possession and enjoyment of the property for life. Its language is, "No proceedings shall work a forfeiture beyond the life of the offender;" not beyond the life estate of the offender. The obvious meaning is, that the proceedings for condemnation and sale shall not affect the ownership of the property after the termination of the offender's natural life. After his death, the land shall pass or be owned as if it had not been forfeited. There is nothing that warrants the belief it was intended, that, while the forfeiture lasts, it should not be complete,

viz.: a devolution upon the United States of the offender's entire right. The words of the Resolution are not exactly those of the constitutional Ordinance; but both have the same meaning, and both seek to limit the extent of forfeitures. In adopting the Resolution, Congress manifestly had the constitutional ordinance in view; and there is no reason why one should receive a construction different from that given to the other. What was intended by the constitutional provision is free from doubt. In England, attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. For this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers. Its purpose has never been thought to be a benefit to the traitor by leaving in him a vested interest in the subject of forfeiture.

There have been some Acts of Parliament, providing for limited forfeitures, closely resembling those described in the Act of Congress as modified by the Joint Resolution. The Statute of 5th Elizabeth, ch. 11, "against the clipping, washing, rounding and filing of coins," declared those offenses to be treason, and enacted that the offender or offenders should suffer death, and lose and forfeit all his or their goods and chattels, and also "lose and forfeit all his and their lands and tenements during his or their natural life or lives only." The Statute of 18th Elizabeth, ch. 1, enacted the same provision "against diminishing and impairing of the Queen's majesty's coin and other coins current within the realm," and declared that the offender or offenders should "lose and forfeit to the Queen's Highness, her heirs and successors, all their lands, tenements and hereditaments during his or their natural life or lives only." Each of these statutes provided that no attainder under it should work corruption of blood, or deprive the wife of an offender of her dower. The Statute of 7 Anne, ch. 21, is similar. They all provide for a limited forfeiture—limited in duration, not in quantity. Certainly no case has been found, none, we think, has ever existed, in which it has been held that either statute intended to leave in the offender an ulterior estate in fee after a forfeited life estate, or any interest whatever subject to his disposing power. Indeed, forfeiture has frequently been spoken of in the English courts as equivalent to conveyance. It was in *Lord Lovell's case*, Plowd., 488, where it was said by Harper, Justice, "The Act (of attainder) is no more than an instrument of conveyance, when by it the possessions of one man are transferred over to another." And again: "The Act conveys it (the land forfeited) to the King, removes the estate out of Lovell, and vests it entirely in the King." In *Burgess v. Wheate*, 1 Eden, 201, in discussing the subject of forfeiture, the Master of the

Rolls said, "The forfeiture operated like a grant to the King. The Crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting. The Crown holds in this case as a royal trustee (for a forfeiture itself is sometimes called a royal escheat). * * * If a forfeiture is regranted by the King, the grantee is a tenant *in capite*, and all *mesne* tenure is extinct." See, also, *Brown v. Waite*, 2 Mod., 133. If a forfeiture is equivalent to a grant or conveyance to the government, how can anything remain in the person whose estate has been forfeited which he can convey to another? No conceivable reason exists why the construction applied to the English statutes referred to should not be applied to our Act of 1862 and the Joint Resolution. If, in the British Statute, the sole object of the limitation of the duration of forfeiture was a benefit to the heirs of the offender, it is the same in our statutes; and it is a perversion of the intent and meaning of the Joint Resolution to read it as preserving rights and interests in those who under the Act had forfeited all their estate. What was seized, condemned as forfeited, and sold, in the proceedings against Charles S. Wallach's estate, was not, therefore, technically a life estate. It is true that, in *Bigelow v. Forrest*, 9 Wall., 339 [76 U. S., XIX., 696], and *Day v. Micou*, 18 Wall., 156 [85 U. S., XXI., 360], some expressions were used indicating an opinion that what was sold under the Confiscation Acts was a life estate carved out of a fee. The language was, perhaps, incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated. The question was not before us. We were not called upon to decide anything respecting the quantity of the estate carved out; and what we said upon the subject had reference solely to its duration.

It is argued on behalf of the defendant, that because under a confiscation sale of land, or of estate therein, the purchaser takes an interest terminable with the life of the person whose property has been confiscated, the fee must be somewhere; for it is said that a fee can never be in abeyance; and as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser, whose interest ceases with the life, it must remain in the person whose estate has been seized. The argument is more plausible than sound. It is a maxim of the common law, that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common law maxim, it must yield to statutory provisions inconsistent with it; and it is, therefore, of no weight in the inquiry what was intended by the Confiscation Act and concurrent Resolution. Undoubtedly there are some anomalies growing out of the congressional legislation, as there were growing out of the Statutes of 5th and 18th Elizabeth; but it is the duty of the court to carry into effect what Congress intended, though it must be by denying the applicability of some common law maxims, the reasons, of which have long since disappeared. It has not been found necessary in England to hold that a reversion remained in a traitor after his attainment, though the statutes declared that the forfeiture shall be during his natural life only.

See 3 Otto.

We are not, therefore, called upon to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States or in the purchaser, subject to be defeated by the death of the offender whose estate has been confiscated. That it cannot dwell in the offender, we have seen, is evident; for, if it does, the plain purpose of the Confiscation Act is defeated, and the estate confiscated is subject alike in the hands of the United States and of the purchaser to a paramount right remaining in the offender. If he is a tenant of the reversion, or of a remainder, he may control the use of the particular estate; at least, so far as to prevent waste. That Congress intended such a possibility is incredible.

If it be contended that the heirs of Charles S. Wallach cannot take by descent unless their father, at his death, was seised of an estate of inheritance, *e. g.*, reversion, or a remainder, it may be answered that, even at common law, it was not always necessary that the ancestor should be seised to enable the heir to take by descent. *Shelley's* case is, that, where the ancestor might have taken and been seised, the heir shall inherit. Fortescue, *J.*, *Thornby v. Fleetwood*, 1 Str., 318.

If it were true that, at common law, the heirs could not take in any case where their ancestor was not seised at his death, the present case must be determined by the statute. Charles S. Wallach was seised of the entire fee of the land before its confiscation, and the Act of Congress interposed to take from him that seisin for a limited time. That it was competent to do, attaching the limitation for the benefit of the heirs. It wrought no corruption of blood. In *Lord de la Warre's* case, 11 Coke, 1 *a*, it was resolved by the justices "That there was a difference betwixt disability personal and temporary and a disability absolute and perpetual; as, where one is attainted of treason or felony, that is an absolute and perpetual disability, by corruption of blood, for any of his posterity to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him: but, when one is disabled by Parliament (without any attainder) to claim the dignity for his life, it is a personal disability for his life only, and his heir after his death may claim as heir to him, or to any ancestor above him." There is a close analogy between that case and the present. See, also, *Wheatly v. Thomas*, 1 Lev., 74.

Without pursuing this discussion further, we repeat, that to hold that any estate or interest remained in Charles S. Wallach after the confiscation and sale of the land in controversy would defeat the avowed purpose of the Confiscation Act, and the only justification for its enactment; and to hold that the Joint Resolution was not intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death, would give preference to the guilty over the innocent. We cannot so hold. In our judgment, such a holding would be an entire perversion of the meaning of Congress.

It has been argued that the Proclamation of amnesty after the close of the war restored to Charles S. Wallach his rights of property. The argument requires but a word in answer. Conceding that amnesty did restore what the United

States held when the Proclamation was issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy. *Semmes v. U. S.* [ante, 193]. Besides, the Proclamation of Amnesty was not made until Dec. 25, 1868.

The decree of the Supreme Court of the District dismissing the complainant's bill is, therefore, reversed, and the cause is remitted for further proceedings in conformity with this opinion.

Cited—94 U. S., 712, 714; 96 U. S., 310; 102 U. S., 133; 108 U. S., 8.

DESIRE A. CHAFFRAIX, *Appt.*,

v.

ARTHUR SHIFF.

(See S. C., 2 Otto, 214.)

Confiscation, effect on title.

The title of a purchaser at a confiscation sale, to whom, after the sale, the person whose property the land confiscated was had released without warranty, is not a complete and valid one. It is ineffective beyond the life of such person and his release does not enlarge it.

No. 634.]

Submitted Jan. 4, 1876. Decided Jan. 10, 1876.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is sufficiently stated by the court.

Mr. Conway Robinson, for appellant.

Mr. J. A. Campbell, for appellee.

Mr. Justice Strong delivered the opinion of the court:

The court below decreed specific performance of a contract for the purchase of real estate, which expressly stipulated that the purchaser should not be bound to accept the sale if the titles were not good and valid. The title offered was that of a purchaser at a confiscation sale, to whom, after the sale, Surget, the person as whose property the land was confiscated, had released, without warranty. That such a title is not a complete and valid one; that it is ineffective beyond the life of Surget, and that his release did not enlarge it, we have decided in *Wallach v. Van Renswick*, the opinion in which has just been read [ante, 473].

The decree of the Circuit Court was, therefore, erroneous and it is reversed and the cause is remanded, with instructions to dismiss the complainant's bill.

Cited—93 N. Y., 458.

JOHN K. KENNARD, *Plff. in Err.*,

v.

STATE OF LOUISIANA, *ex rel.* PHILIP HICKEY MORGAN.

(See S. C. 2 Otto, 480-483.)

Due process of law, what is—State Courts—rule to show cause—precedence—Constitutional provision.

1. The due course of legal proceedings, accord-
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ing to those rules and forms which have been established for the protection of private rights, is due process of law.

2. Irregularities and mere errors in the proceedings of State Courts can only be corrected in those courts. The authority of this court does not extend beyond an examination of the power of the courts below to proceed at all.

3. A rule upon the incumbent to show cause why he refuses to surrender his office, and for service of this rule upon him, issued in pursuance of a state statute, was process, and when served it was sufficient to bring the incumbent into court, and to place him within its jurisdiction.

4. Due process of law does not necessarily imply delay, and it is no interference with the rights of the parties to give such cases as this precedence over the other business in the courts.

5. A state Act, by which ample provision is made for the trial of the case before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State; and for hearing and judgment there, is not in violation of the provision in the U. S. Constitution, which prohibits any State from depriving any person of life, liberty or property, without due process of law.

[No. 60.]

Argued Dec. 1, 1875. Decided Jan. 10, 1876.

IN ERROR to the Supreme Court of the State of Louisiana.

This was an action in the nature of *quo warranto*, brought by Philip H. Morgan against the plaintiff in error, in the Superior District Court for the Parish of Orleans. Morgan and Kennard were claimants of the office of Associate Justice of the Supreme Court of Louisiana. Kennard was appointed Dec. 8, 1872, during a recess of the Senate, by Governor Warmouth. Morgan was appointed Jan. 4, 1873, by Governor Pinchbeck, confirmed the same day, qualified on the 13th, and brought this suit on the 16th of the same month, under the summary proceedings provided by statute entitled "An Act to Regulate Proceedings in Controversies between Persons Claiming a Judicial Office," approved Jan. 15, 1873. Under article 61 of the Louisiana Constitution, Kennard's appointment continued until the expiration of the next regular session of the General Assembly. Kennard claimed that this session terminated Mar. 1, 1873. Morgan contended that Kennard's commission expired with an extra session, Jan. 6, 1873. The court of original jurisdiction, as well as the Supreme Court of Louisiana, decided in favor of Morgan.

The case, so far as is here material, further appears in the opinion.

Messrs. Thomas J. Semmes, Robert Mott, N. P. Chipman, Hosmer and P. Phillips, for plaintiff in error:

We respectfully submit that there can be no sounder consideration of public policy than the preservation in their integrity, of the Constitution, the laws of the land and the modes of their execution, all of which have received a rude shock from this unprecedented case, in disregard of the oldest maxims and precedents of the law.

As to the meaning of the term "due process of law," see Cooley, *Const. Lim.*, ed, 1868, pp. 53, 54; *Westervelt v. Gregg*, 12 N. Y., 200; *Ek v. Okely*, 4 Wheat., 235.

Citation, or some notice equivalent thereto, is the foundation of the action, and a proceeding without it is utterly void, unless the defendant

waives it and voluntarily enters an appearance. Code Pr. La., art. 206.

In this case, the defendant, so far from voluntarily entering his appearance, filed his formal exception.

Messrs. Durant & Hornor, for defendant in error,

Cited, *R. R. Co. v. Bk.*, 60 Barb., 234; *Patterson v. Barlow*, 60 Pa., 79; *Murdock v. Memphis*, 20 Wall., 590 (87 U. S., XXII., 429); *Collector v. Day*, 11 Wall., 123 (78 U. S., XX., 125); *The Slaughter-House Cases*, 16 Wall., 36 (83 U. S., XXI., 394).

Mr. Chief Justice Waite delivered the opinion of the court:

The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is, whether the State of Louisiana, acting under the Statute of Jan. 15, 1873, through her judiciary, has deprived Kennard of his office without due process of law. It is substantially admitted by counsel in the argument that such is not the case, if it has been done "In the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." We accept this as a sufficient definition of the term "due process of law," for the purposes of the present case. The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guarantied by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State Courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all.

This makes it necessary for us to examine the law under which the proceedings were had, and determine its effect.

It was entitled "An Act to Regulate Proceedings in Contestations Between Persons Claiming a Judicial Office." Sec. 1 provided, that "In any case in which a person may have been appointed to the office of judge of any court in this State, and shall have been confirmed by the Senate and commissioned thereto, * * * such commission shall be *prima facie* proof of the right of such person to immediately hold and exercise such office."

It will thus be seen that the Act relates specially to the judges of the courts of the State, and to the internal regulations of a State in respect to its own officers.

The 2d section then provides, "That if any person, being an incumbent of such office, shall refuse to vacate the same, and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed by rule before the court of competent jurisdiction, to have himself declared to be entitled to such office, and to be inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matter or causes depending in such court; * * * and the judgment thereon shall be signed the same day of rendition."

There is here no provision for a technical Sec 2 Otto.

"citation," so called; but there is, in effect, provision for a rule upon the incumbent to show cause why he refuses to surrender his office, and for service of this rule upon him. The incumbent was, therefore, to be formally called upon by a court of competent jurisdiction to give information to it, in an adversary proceeding against him, of the authority by which he assumed to perform the duties of one of the important offices of the State. He was to be told when and where he must make his answer. The law made it the duty of the court to require this return to be made within twenty-four hours, and it placed the burden of proof upon him. But it required that he should be called upon to present his case before the court could proceed to judgment. He had an opportunity to be heard before he could be condemned. This was "process;" and, when served, it was sufficient to bring the incumbent into court, and to place him within its jurisdiction. In this case, it is evident from the record that the rule was made, and that it was in some form brought to the attention of Kennard; for on the return day he appeared. At first, instead of showing cause why he refused to vacate his office, he objected that he had not been properly cited to appear; but the court adjudged otherwise. He then made known his title to the office; in other words, he showed cause why he refused to vacate. This was, in effect, that he had been commissioned to hold the office till the end of the next session of the Senate, and that time had not arrived. Upon this he asked a trial by jury. This the court refused, and properly, because the law under which the proceedings were had provided in terms that there should be no such trial. He then went to trial. No delays were asked except such as were granted. Judgment was speedily rendered; but ample time and opportunity were given for deliberation. Due process of law does not necessarily imply delay; and it is certainly no improper interference with the rights of the parties, to give such cases as this precedence over the other business in the courts.

The next section provides for an appeal. True, it must be taken within one day after the rendition of the judgment, and is made returnable to the Supreme Court within two days. The proceeding on appeal was given preference over all other business in the appellate court, and the judgment upon the appeal was made final after the expiration of one day. Kennard availed himself of this right. He took his appeal, and was heard. The court considered the case, and gave its judgment.

From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the Act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent

jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted and, upon his appeal, in the highest court of the State.

The judgment is affirmed.

Cited—96 U. S., 106; 104 U. S., 80; 110 U. S., 533.

RUFUS BAKER AND ISAAC F. GRAHAM,
Assignees of the ODORLESS RUBBER
COMPANY, *Plffs. in Err.*,

v.

HENRY S. WHITE.

(See S. C., 2 Otto, 176-179.)

Final judgment.

An order that the judgment and verdict in the court below be set aside and a new trial awarded, is not a final judgment from which a writ of error lies to this court.

[No. 110.]

Argued Jan. 4, 5, 1876. Decided Jan. 17, 1876.

IN ERROR to the Circuit Court of the United States for the District of Connecticut.

This action was originally brought in the United States District Court for the District of Connecticut, by the plaintiffs in error, as assignees of the Odorless Rubber Co., against the defendant as a subscriber to the capital stock of of the Corporation.

The court directed the jury to bring in a verdict for the plaintiffs for \$2,496 and costs, which was done.

The defendant, thereupon, brought his writ of error to the circuit court.

On the trial, in the circuit court, the decision of the district court was reversed.

The case further appears in the opinion.

Mr. C. E. Perkins, for plaintiffs in error.

Mr. A. P. Hyde, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

The Odorless Rubber Company, being in an embarrassed condition, undertook to relieve itself by obtaining additional subscriptions to its capital stock. It was conceived that, in order to do this, it was necessary that those holding the existing stock should submit to a reduction of its par value, as it was not really worth par at that time; and new subscribers could not be expected to take a stock which they knew to be below the value they were to pay for it. Accordingly, on the 10th June, 1872, at a meeting of the stockholders, "on motion of S. L. Warner, it was voted that, whereas, the capital stock of this Company now issued, and the assets of the same, have become impaired to the extent of thirty per cent. on the whole amount of said stock, to wit: the sum of \$72,000.50, therefore, voted, that stock to the amount of of \$72,112.50

be called in and canceled upon the books of this Company."

At a former meeting it had been resolved that the capital stock of the Company be increased to \$200,000, or eight thousand shares.

The defendant, after these resolutions had been adopted, signed the following instrument, and set opposite his name two hundred and forty, as the number of new shares for which he subscribed:

"We, the undersigned, hereby agree to take the number of shares of the capital stock of the Odorless Rubber Company placed opposite our respective names, and pay for the same as follows, to wit: \$6.25 per share whenever cash subscriptions to the amount of \$118,000 shall have been made, and the balance in equal monthly installments of ten per cent. each from the date of June 1st, A. D. 1872. Said stock to be fully paid whenever eighty-five per cent. of the par value shall have been paid into the treasury of the Company; it being understood that none of said subscriptions shall be valid or obligatory until at least said amount of \$118,000 of stock shall have been subscribed as aforesaid, and that thirty per cent. deduction is made on the old stock of this Company, as per vote of stockholders June 10, 1872.

Dated at Middletown, this 10th day of June, 1872."

He was elected a director, and acted as such for a short time, and paid his installments regularly until he had paid \$2,700. He then refused to pay any more; and, the Corporation having been adjudged bankrupt, the plaintiffs, as assignees, brought the present suit to recover the unpaid installments, amounting to \$3,800.

Two defenses were relied on by defendant: 1. That one of the conditions on which he agreed to pay was, that thirty per cent. of the old stock was to be deducted or extinguished, and this had not been done. 2. That the subscriptions had been obtained by fraudulent representations as to the condition of the Company; that the whole proceeding was a fraudulent design to relieve the old stockholders of a broken corporation, at the expense of the new subscribers; and that, as soon as he had learned enough of the condition of the Company to become aware of this fraud, he abandoned the concern, and repudiated the contract.

This suit was brought in the district court; and the judge of that court refused to charge the jury, when requested, that in the true construction of the subscription paper, above quoted in full, the subscription was not obligatory until the thirty per cent. reduction of old stock had been made, and also rejected evidence of the fraud in obtaining the defendant's subscription.

On a writ of error to the circuit court, where these matters were shown by a bill of exceptions taken in the district court, the judgment of that court was reversed.

The circuit court rested its judgment on the construction of the subscription paper; and as that is sufficient to dispose of the case, and as we concur in the view taken by that court, we shall only consider that question.

The counsel for plaintiffs in error construed the paper as if it read thus:

"It being understood that none of the subscriptions shall be valid or obligatory until at least said amount of \$118,000 of stock shall

NOTE.—What is final decree or judgment of state or other court from which appeal lies. See note to *Gibbons v. Ogden*, 18 U. S. (5 Wheat.), 448.

have been subscribed as aforesaid, and it being also understood that thirty per cent. deduction is made on the old stock of this Company, as per vote of stockholders June 10, 1872.

Dated Middletown, the 10th day of June, 1872."

Reading it thus, they argue that the last clause, relating to the thirty per cent. deduction, is only a representation of what was understood to be an existing fact at the time it was made, and not a condition like the one as to the amount of stock to be taken, without which the subscription was not obligatory.

It is possible so to construe the language of the instrument, if the surrounding circumstances demanded it. But to one who saw the paper for the first time, and knew nothing more, it would seem a forced, and not a natural construction. If the word "that" just before "thirty per cent." were omitted in the original, the plain grammatical meaning would be, that the subscriptions were only obligatory in case the \$118,000 of stock was subscribed, and the thirty per cent. of the old stock called in or deducted.

We cannot give to the use of the word "that" such force as to destroy the natural and reasonable meaning which the sentence would have without it.

But when, leaving grammatical and verbal criticism, we look to the admitted surrounding circumstances of the case, what was meant is quite clear.

The paper bears the same date as the resolution to reduce the stock. That resolution did not profess to have the effect of reducing the stock, of itself, but only declared that \$72,112.50 of said stock be called in—a thing to be done in future; and the bill of exceptions shows that the directors accordingly made an effort to get the stockholders to surrender and cancel stock to that amount, but failed to get it done.

When a subscriber put his name to the agreement to take new stock, the obtaining of the \$118,000, on which his subscription depended for its validity, was a thing to be accomplished in the future: and so, on the 10th day of June—the date of this paper—a subscriber, looking to these two things promised, but yet to be performed, said: "I subscribe, but it is upon condition that I am only to be liable when they are performed; that is, when \$118,000 new stock is subscribed, and when thirty per cent. of the old stock is called in and canceled, as per resolution of the Company of this date."

We are of opinion that the circuit court properly construed this instrument; and, as it is not proved or asserted that this stock ever was so reduced, the defendant was not liable on that contract.

But, when we come to look for the judgment of the circuit court, which should be affirmed on these considerations, we find that there was in that court no final judgment. There exists in the record only an order reversing the judgment of the district court. But, supposing a more formal entry to have been made, it could only be that the judgment and verdict in the district court be set aside, and a new trial awarded.

We have so repeatedly decided that such an order as this is not a final judgment from which a writ of error lies to this court, that it needs no further discussion. *Parcels v. Johnson*, 20 See Otto.

Wall., 658 [87 U. S., XXII., 410]; *Macomb v. Knox Co.* [ante, 185].

But the case was fully argued by counsel on the merits. The court, in conference, came to the conclusion (which was unanimous), indicated in this opinion; and we have concluded to let the opinion accompany the only judgment which we can render on this record, namely: *that the writ of error be dismissed for want of jurisdiction.*

Cited—106 U. S., 4.

THOMAS SLATER SMITH, ESTHER A.,
HIS WIFE, AND JAMES S. JENKINS,
Appts.,

v.

WILLIAM VODGES, Assignee of THOMAS
SLATER SMITH, a Bankrupt.

(See S. C., 2 Otto, 188-186.)

Marriage settlement, when valid—equity.

1. In order to defeat a settlement made by a husband upon his wife, it must have been intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene.

2. Where money has been misappropriated, the general rule of equity is, that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested, or to recover the money.

[No. 114.]

Argued Jan. 5, 1876. Decided Jan. 17, 1876.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a bill in equity, filed by the appellee, to recover certain real estate standing in the name of the wife of the bankrupt, now one of the appellants. Jenkins, another appellant, was her tenant. The facts are stated in the opinion.

Messrs. N. H. Sharpless and Richard C. McMurtrie, for appellants.

Mr. William A. Manderson, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

The law of this case is too well settled to admit of doubt. In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. *Sexton v. Wheaton*, 8 Wheat., 229; *Mullen v. Wilson*, 44 Pa., 418; *Stileman v. Ashdown*, 2 Ark., 481.

Fraud is always a question of fact to be determined by the court or jury upon a careful scrutiny of the evidence before it.

The view which we take of this case renders

NOTE.—Settlements or conveyance for benefit of wife and child; when good or void as to creditors. See note to *Sexton v. Wheaton*, 21 U. S. (8 Wheat.), 229.

it unnecessary to consider the objections urged by the counsel of the appellants against the reference to the master, the exceptions to the master's reports, and the questions raised by the demurrers to the original and the amended bill.

Passing by these subjects, and looking only to the merits of the controversy, two points to be examined arise. They involve questions of fact which must be solved in the light of the evidence found in the record. The burden of proof rests upon the appellee.

1. What was the pecuniary condition of the bankrupt when the property in question was bought at the sale under execution, and conveyed by the sheriff to Esther A. Smith?

The date of the transaction was the 2d of June, 1862. The amount paid was \$1,450. The property consisted of a dwelling-house and store-room, which she had leased in the year 1859. The rent was \$150 per year. She and her husband occupied the premises up to the time of the sale. She kept a dry goods store and a millinery and dress-making establishment in her own name. She was eminently successful. The bill avers and admits that, at the time of the purchase of the property, she had realized profits to the amount of \$10,000, and that the property was paid for out of this fund. There is proof in the record to the same effect. In conducting her business, she paid promptly; and it does not appear that she then or subsequently owed anything which is unpaid. The husband had paid all his debts except two. For those he had given extension notes, having short times to run; and they were paid at maturity.

This investment for the benefit of the wife was never challenged by any creditor of the husband or the wife; and it is not now challenged in behalf of any creditor whose debt subsisted then or accrued for a considerable time afterwards. Under the circumstances, the investment was moderate in amount, proper to be made and, we think, liable to no legal objection as to its validity. The testimony to be considered in connection with the next point throws a backward light, which is also favorable to the wife with respect to this part of the case.

2. What was the pecuniary condition of the bankrupt when he extinguished the ground-rent by which the property was incumbered?

The money was paid about the 1st of January, 1866; and the amount was \$3,000.

After the 1st of January, 1863, the business, which had before been carried on in the name of the wife, was conducted in that of the husband. It continued to be prosperous for several years. He thinks he made from \$10,000 to \$15,000 a year. He sold the first year from \$50,000 to \$60,000 worth of goods. Such is his testimony, and it is uncontradicted. He paid all his debts, and considered himself in independent circumstances. His standing was such that he had no difficulty in buying goods on credit. A merchant says, "His credit was good. I was willing and anxious to sell him all the goods I could" (Corbin's testimony). The cashier of the 4th National Bank, speaking of his credit in that institution between the years 1864 and 1868, says: "He was able to get all he asked for, which was the greatest amount at one time, \$5,000, only on account of his average good balance in bank" (McMullen's testimony).

No debt now exists which existed prior to

1868; and there is none now existing which can be said in any sense to stand in renewal or continuity of any such prior debt.

In the early part of 1867, there was a marked reflux in the tide of prosperity throughout the country. It swept many of those exposed to it into hopeless insolvency. The bankrupt became embarrassed and depressed. His wife proposed to relieve him by making a loan of \$4,000, to be secured by a mortgage upon the property in question. This suggestion was carried out. The loan was made and the mortgage given in March, 1867. The money was paid over to his creditors. This enabled him for a time to weather the storm. But times grew worse. The shrinking in the value of dry goods was immense. He testifies that muslins for which he paid seventy cents per yard he was compelled to sell for twenty.

His loss by shrinkage he estimates at \$20,000. In 1868, when his stock had been reduced in value to about \$20,000, he sold it for that sum to the clerks, all females and relatives, who had been employed in the store, and took their notes accordingly. These notes he indorsed to his creditors. Some of them have been paid, and others not. When the stock in the hands of the vendees had been reduced to a remnant, worth about \$2,000, it was sold under process in favor of his wife for the payment of the accumulated rents due to her.

The mortgage to secure the loan of \$4,000 is still unsatisfied.

The bankrupt testifies that his failure was due to the losses of a firm of which he was a member; and that, but for that connection, he would still be in prosperous circumstances.

We think the payment of the \$3,000 to extinguish the ground-rent was honestly made, and was warranted by the condition at that time of the bankrupt's affairs. They were then prosperous, and he had no reason to anticipate the reverses which followed. If there could otherwise be any doubt as to the integrity of this transaction, it is removed by the loan and mortgage and the application of the money borrowed. If there had been a purpose to defraud when the property was bought or the ground-rent extinguished, the mortgage would not have been given. It is entirely inconsistent with such an idea. The loan replaced the amount paid for the ground-rent, with an excess of \$1,000; and it equaled the amount paid for both the property originally and in extinguishment of the ground-rent, less \$450.

We hold the transactions both as to the ground-rent and the original purchase to have been honest and valid.

Where money has been misappropriated, the general rule of equity is, that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested, or to recover the money. *Olicer v. Piatt*, 8 How., 401.

Lord Ellenborough held that the same rule is applicable at law. *Taylor v. Plumer*, 3 Man. & S., 562.

It was claimed by the counsel for the appellants, that, if the transactions here in question should be adjudged fraudulent, the assignee would only have a lien upon the premises for the amount to which it might be held he was entitled with interest.

The conclusions at which we have arrived upon the facts render it unnecessary to consider the law of the remedy.

The decree of the Circuit Court is reversed and the case will be remanded to that court with directions to dismiss the bill.

Cited—18 Bk. Reg., 128; 2 Flipp., 194.

J. YOUNG SCAMMON, *Appl.*,

v.

MARK KIMBALL, Assignee of the MUTUAL SECURITY INSURANCE COMPANY.

(See S. C., 2 Otto, 362-371.)

Set off by stockholder—insurance losses.

1. Claim for losses by fire due from an insurance company, cannot be set off by the insured against notes given by him for capital stock of the same company.

2. But such claim for losses can be set off by the insured against a claim by the Insurance Company, or its assignee in bankruptcy, for moneys deposited with him as a private banker.

[No. 118.]

Argued Jan. 6, 1876. Decided Jan. 17, 1876.

A PPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. J. Young Scammon, p. p. and Matt. H. Carpenter, for appellant:

The appellant relies upon the following authorities:

1. In support of the right of set-off: The Bankrupt Act, sec. 20; *Tucker v. Oxley*, 5 Cranch, 34; *Holbrook v. Receivers of Ins. Co.*, 6 Paige, 220; *In the Matter of Globe Fire Ins. Co.*, 2 Edw. Ch., 625; *Gray v. Rollo*, 18 Wall., 629 (85 U. S., XXI., 927); *Drake v. Rollo*, 8 Biss., 274; *Olive v. Smith*, 5 Taunt., 56; *Young v. Bk. of Bengal*, 1 Dea., 622; *Jones v. Robinson*, 26 Barb., 810; *Berry v. Brett*, 6 Bosw., 627; *Bize v. Dickason*, 1 T. R., 285; *Grove v. Dubois*, 1 T. R., 112; *Osgood v. DeGroot*, 86 N. Y., 848.

2. That the contract with the Company need not be proved by express vote, but may be implied from acts: *Ang. & Ames, Corp.*, 282; *R. R. Co. v. Murray*, 15 Ill., 886; *Bk. v. Patterson*, 7 Cranch, 299; *Bk. v. Dandridge*, 12 Wheat., 72; *Bridge Proprs. v. Gordon*, 1 Pick., 297; *Dunn v. St. Andrews Ch.*, 14 Johns., 118; *Kennedy v. Ins. Co.*, 8 Harr. & J., 867; *Smith v. Proprs., etc.*, 8 Pick., 178; *Chicago v. Joney*, 60 Ill., 888; *Nugent v. Supervisors*, 19 Wall., 247 (86 U. S., XXII., 87).

3. The deposit of the money with him as banker constituted a loan, and no trust attached to it in his hands.

Hill, Trust., 178; *Pott v. Clegg*, 16 Mees. & W., 821; *Sims v. Bond*, 5 B. & Ad., 389; *Carr v. Carr*, 1 Meriv., 541; *Detaynes v. Noble*, 1 Meriv., 568.

Messrs. John L. Thompson, A. M. Pierce and Norman Williams, for appellee:

The proof in the case does not establish a contract of loan.

(a) The evidence of an arrangement or contract was incompetent. Directors must act as

a body, and conversation among them is no evidence of their action. The record is the best evidence.

Butler v. Iron Co., 22 Conn., 385; *Essex Turnpike Co. v. Collins*, 8 Mass., 298.

(b) The charter of the Company does not contemplate a loan of the Company's money on call, and without security. Sec. 18 of Charter.

(c) The fiduciary relations of the appellant to the Company and its assets forbid the making such a contract, and having such effects as are claimed for it in this case.

Curran v. Ark., 15 How., 304; *Wood v. Dummer*, 8 Mas., 308; *Vose v. Grant*, 15 Mass., 505; *Richards v. Ins. Co.*, 43 N. H., 263; *Nevitt v. Bk.*, 6 Sm. & M., 518; *Koehler v. Iron Co.*, 2 Black, 715 (67 U. S., XVII., 839); *Nathan v. Whitlock*, 2d Edw. Ch., 215; *Nathan v. Whitlock*, 9 Paige, 152; *Robinson v. Smith*, 3 Paige, 222; *Char. Corporation v. Sutton*, 2 Atk., 404; *Butts v. Wood*, 37 N. Y., 317; *Claflin v. Bk.*, 25 N. Y., 298; *Stacey v. Bk.*, 4 Scam., 91; *Benson v. Heathorn*, 1 Y. & C., 329; *Ex parte Lacey*, 6 Ves., 626; *Pocock v. Reddington*, 5 Ves., 799; *Story, Eq. Jur.*, sec. 1252; *Perry, Trusts*, sec. 453.

The debts do not exist against and in favor of the same parties in the same right, and are not of the same character and quality, and hence do not justify a set-off.

Sawyer v. Hoag, 17 Wall., 610 (84 U. S., XXI., 731); *Lawrence v. Nelson*, 21 N. Y., 158; *Duncan v. Lyon*, 3 Johns. Ch., 858; *Isberg v. Bowden*, 8 Exch., 857; *Fair v. McIvor*, 16 East, 180; *Chit. Cont.*, 955; *Wat. Set-off*, 209, and cases cited; *Vincent v. Candolfo*, 12 La. Ann., 526; *Freeman v. Lomas*, 5 Eng. L. E., 120; *White v. Word*, 22 Ala., 442; *Banton v. Hoopes*, 1 A. K. Marsh., 19; *McPherson v. Ross*, 1 Md., 181; *Cummings v. Williams*, 5 J. J. Marsh., 384.

Mr. Justice Clifford delivered the opinion of the court:

Jurisdiction is vested in the circuit courts, under the Bankrupt Act, 14 Stat. at L., 517, concurrent with the district court for the same district, of all suits, at law or in equity, which may or shall be brought by any person against the assignee of the bankrupt's estate, touching any property, or rights of property, of the bankrupt, transferable to or vested in such assignee.

Pursuant to that authority, the appellant, on the 8d day of May, 1872, filed the present bill of complaint in the circuit court against the appellee as assignee of the bankrupt Company described in the title of the case. Prior to that, to wit: on the 27th of January in the same year, the Insurance Company was duly adjudged bankrupt; and the record shows that the present appellee was appointed the assignee of the estate of the bankrupt Company.

Satisfactory evidence is exhibited in the record to show that the Company was duly organized with a nominal capital of \$800,000, of which ten per cent. had been paid, and that the residue was secured by the notes of the subscribers. Provision is made by the charter that the stock and affairs of the corporation shall be managed and conducted by any number of directors, not more than twenty-five nor less than nine, to be chosen by ballot from among

and by the stockholders. Directors, it is also provided, shall choose out of their number a president and vice-president; and the directors have the power to appoint, for the time being, "such officers, secretaries, agents and servants as they shall judge necessary."

Shares in the stock of the Company, to a large amount, were owned by the complainant; and he admits that the Company held notes against him to the amount of \$10,147.50, given to secure unpaid balances of subscriptions, for which he was liable either as principal guarantor or surety. Throughout the lifetime of the Company, the complainant insured many and valuable properties in the Company, and paid to the proper officers of the same large sums of money as premiums for such policies of insurance. Antecedent to the event which caused the failure of the Company, the proper officers of the same transacted a large and, for the greater portion of the time, a prosperous insurance business.

Much reference to those details will not be made, as they are no longer material in this investigation. Suffice it to say, in that connection, that the complainant was, as he alleges, during the whole of that period, a large owner of real and other property, and was possessed of sufficient means to render secure any moneyed obligation into which he might enter, and to enable him to perform any promise or contract for the payment of money he might make; and he also alleges that it was necessary that the means of the Company should be kept where the same could be promptly commanded, if required to pay losses; and in order that the Company might accomplish that object, and still realize interest on the same, he came to an agreement with the proper authorities of the Company that the funds thereof, or such portion of the same as they might choose, should thereafter, from time to time, be deposited with him, he being then a private banker, and that the moneys so deposited should be paid out or drawn at the pleasure of the Company, without notice or limitation; and he avers that he agreed with the Company to account with the proper officers for such moneys when and as often as thereto required, and to pay to the Company interest thereon, at the rate of ten per centum annually during the continuance of such deposit, until a further or other agreement should be made.

Funds of the kind contemplated were, in accordance with the agreement, deposited with the complainant at the pleasure of the Company; and the complainant avers that he paid interest on the average amount of the same, at the agreed rate, for the period and to the amount specified in the exhibit annexed to the bill of complaint.

Ten per centum per annum was paid during the period specified in the annexed exhibit; but it appears that the rate at the close of that period was reduced to eight per cent. per annum, and the complainant admits that no part of the interest since the rate was reduced has been paid.

Both parties, it seems, were solvent until the 9th of October, 1871, when a large part of the property of the complainant and others, which was insured by the Company, was destroyed by fire, the immediate effect of which was to cause

the failure of the Insurance Company. Losses of the complainant by the fire, for which the Company is responsible, as claimed by the complainant, amount to the sum of \$55,800, as appears by the second exhibit annexed to the bill of complaint; and he admits that he held on deposit at the time the Company failed the sum of \$39,188.03, received under the agreement already fully described, which is due to the Company, with eight per cent. interest from July 1, 1871, to the 18th of December in the same year.

Process was accordingly issued. The complainant prays that the respondent may be decreed to deliver to him the notes referred to; that he, the respondent, shall acquit and discharge the complainant from the admitted indebtedness to the Company, that he, the complainant, be allowed to prove the balance of his demand against the estate of the bankrupt Company; and that the respondent be enjoined and restrained from selling or assigning the said notes, and from instituting any suit against the complainant to recover the notes or his indebtedness to the Company.

Service was made, and the respondent appeared and filed an answer. He admits that the complainant was one of the original corporators of the Company, and subscribers to its capital stock; that only ten per cent. of the subscriptions for the capital stock was paid in cash, and that ninety per cent. of the same was secured in the promissory notes of the subscribers; that the Company at the time of the great fire became insolvent, and that the Company on the day named in the bill, was adjudged bankrupt; that the Company, as alleged, issued several policies of insurance to the complainant, and that he sustained large losses by the great fire; that he is indebted to the Company as set forth in the third schedule exhibited in the record, and that he was and is the holder of the funds of the Company to the amount specified in the bill of complaint; but the respondent avers that the Company never came to any such agreement, in respect to such funds, as that alleged, and that the complainant held the same solely in his official character as treasurer of the Company.

Most of the allegations of the answer were also embodied in a cross-bill filed by the respondent at the same time, in which he denied all the equity of the original bill, and prayed for a decree in his own favor, and that the complainant in the original bill be decreed to pay over to him as assignee the whole amount he owed to the Company, including the notes given for subscriptions for stock and the amount he held on deposit.

Proofs were taken, and, the parties having been fully heard, the court dismissed the original bill of complaint, and entered a decree for the respondent in the sum of \$9,582, being the amount of the promissory notes given for capital stock, and \$39,188.03, being the amount of the funds of the Company held by the respondent in the cross-bill, with ten per cent. interest on both amounts. Immediate appeal was taken by the complainant in the original bill and respondent in the cross-bill, and he now seeks to reverse that decree.

Complainant's losses by the great fire, it is admitted, amount to \$45,015.88, and that the

Company is liable to him in that amount for such losses under the policies of insurance issued to the complainant prior to the fire.

Since the bill of complaint was filed in this case, this court has decided that the debt due to a stockholder in such a case, for losses sustained by the stockholder, of properties insured by the Company, cannot be set off against his indebtedness to the Company for unpaid shares in the capital stock of the Company, for the reason that moneys arising from that source constitute a trust fund for the payment of the debts of the Company which, in the due administration of the Bankrupt Law, must be equally divided among all the creditors of the bankrupt. *Sawyer v. Hoag*, 17 Wall., 610 [84 U. S., XXI., 731].

Such an indebtedness constitutes an exception to the rule that, where there are mutual debts, "one debt may be set against the other," as originally provided by Act of Parliament: or perhaps it would be more accurate to say that the rule does not apply where it appears that the debts are not in the same right as well as mutual. *U. S. v. Eckford*, 6 Wall., 488 [73 U. S., XVIII., 921].

Whether the suit be one at law or in equity, set-off must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other, to set off their respective debts by way of mutual deduction, so that, in any action brought for the larger debt, the residue only, after such deduction, shall be recovered. *Adams*, Eq., 6th Am. ed., 447.

Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off of debts accruing in different rights, except under very special circumstances, and where the proofs are clear and the equity is very strong. 2 Story, Eq., 6th ed., sec. 1437.

Equity regards the capital stock and property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue such properties into whosoever possession the same may be transferred, unless the stock or property has passed into the hands of a *bona fide* purchaser; and the rule is well settled, that stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid. *R. R. Co. v. Howard*, 7 Wall., 416 [74 U. S., XIX., 122].

Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are the assets of the corporation, and as such, constitute a fund for the payment of its debts; and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be seized by a creditor on such process, and subjected to the payment of the indebtedness of the Company; and where the fund has been improperly distributed among the stockholders, or passed into the hands of third persons not *bona fide* creditors or purchasers, the established rule in equity is, if the debts of the Company remain unpaid, that such holders take the fund charged with the trust in favor of the creditors, which a court of equity will enforce, and compel the applica-

tion of the same to the satisfaction of the debts of the corporation. 2 Story, Eq., 9th ed., sec. 1252; *Mumma v. Potomac Co.*, 8 Pet., 286; *Wood v. Dummer*, 3 Mas., 308; *Voss v. Grant*, 15 Mass., 522; *Spear v. Grant*, 16 Mass., 14; *Curran v. Arkansas*, 15 How., 307.

Tested by these considerations, it is clear that the prayer of the bill of complaint, that the respondent may be directed to deliver to the complainant the notes referred to, must be denied.

Claim for losses due from the Company cannot be set off against the notes given for capital stock. Suppose that is so; still the complainant insists that such claims for losses may be set off against the amount due from him to the Company, for the moneys of the Company deposited with him under the agreement set forth in the bill of complaint.

Matters alleged in the bill of complaint and denied in the answer must be proved before such matters can be assumed as true by the court. Concede that, and it follows that the important question remains to be considered, whether there was such an agreement between the complainant and the Company, in respect to the moneys deposited with the complainant, as that set forth in the bill of complaint.

Moneys to a large amount were deposited with the complainant; and it is not denied that he paid interest on the same to the amount of \$11,799.96, as shown by the first schedule annexed to the original bill; but the respondent in the original bill, and complainant in the cross-bill, alleges that the complainant in the original bill received and held all such sums as treasurer of the Company, and that the balance in his hands is a trust fund belonging to all creditors, and, consequently, that his claim for losses under the policies issued to him by the Company cannot be set off against his indebtedness to the Company for the balance of that fund in his hands. He admits that he was elected to the office of treasurer by the directors in the month of July, 1870, and that he was re-appointed thereto during the following year; but he denies that he ever accepted the office, or that he ever qualified as such, or that he held in his custody any money whatever as treasurer of the Company. Subsequently he was examined as a witness in the case, and testified that he never qualified as treasurer or gave bond, and never had any other or different relations with the Company in respect to its funds than such as existed before he was elected.

What he states in respect to the alleged agreement is substantially as follows: that he agreed, at the first meeting of the directors, to receive all moneys paid to the Company, and to allow the Company ten per cent. interest upon it, payable annually, until he should notify the Company to the contrary, or a different arrangement should be made between the parties; the purpose of the directors being to have the money at all times available, as far as possible, and at the same time to get interest on it; and he says that he made the offer, not because it was of advantage to him, but to encourage the Company.

Sufficient appears to show that the complainant was at that time a private banker in good standing, and of great reputed wealth; and he testifies that the arrangement was continued as long as the Company transacted business, ex-